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TREATISE

UPON THE

Estate and Rights of the Corporation

OF THE

CITY OF NEW YORK,

AS PROPRIETORS:

By MURRAY HOFFMAN, Esq.

Volume I.

SECOND REVISED EDITION.

NEW YORK:
EDMUND JONES & CO., PRINTERS TO THE CORPORATION.
No. 26 John Street.
1862.

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"IS SOO SCHOONEN LANDT ALS MEN MET VOETEN BETVEDEN MUCH."—*Hendrick Hudson*, 12 *Sept.*, 1609.

"WE DESIRE NOTHING MORE THAN THAT NEW AMSTERDAM, OUR CAPITAL AND RESIDENCE, MIGHT CONTINUE AND INCREASE IN GOOD ORDER, JUSTICE, POLICE, POPULATION, PROSPERITY, AND MUTUAL HARMONY."—*Governor Stuyvesant*, 1647.

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PREFACE TO THE SECOND EDITION.

SINCE the publication of the first edition of this work, numerous decisions have been made upon the subjects examined. More attention has been given to the important and exciting questions connected with the powers of the Corporation. A great diversity of opinion exists among able judges, as to many points of moment. Some few have received a final decision in the Court of Appeals. Yet I doubt whether we are not now in a state of greater uncertainty, than we were in 1853. In this edition I have sought to bring together all the information I could obtain, to assist in removing difficulties, and reaching precision.

DECEMBER, 1861.

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IN MEMORIAM.

THE author received permission from the late Chief Justice, SAMUEL JONES, to dedicate the following work to him. As it was passing through the press, death closed the long course of the labors and honors of that venerable man. The inscription which I should so gratefully have tendered to the living, I mournfully offer to the memory of the dead. It is but a feeble strain to add to the sound of that homage to his worth, which the united voice of the profession has uttered. He lived the life of a lawyer and a judge—unsurpassed in learning, integrity, and ability. He died, entitled to the tribute of Tacitus to Agricola, "possessing all the best enjoyments that spring from virtue; adorned with every dignity; with his honors blooming around him, and the ties of friendship preserved to the last." He died, with what the noble Roman did not possess, "in the communion of the Catholic Church, in the comfort of a reasonable, religious, and holy hope." Let his memory be cherished, and his example be followed, as a model of all that was earnest, just, and wise; and his influence will live, as a blessing, beyond his life.

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INTRODUCTION.

The city of New York, from the period when a few enterprising Hollanders built a solitary trading house upon its southern point,* has spread itself over half the island and expanded its population to half a million of people ;† from the time when a simple charter of half a dozen lines, and a few plain ordinances were sufficient for its government, its code has increased to a voluminous body of laws, found in ancient charters, with elaborate clauses—in a multitude of statutes, with complicated provisions—and in a mass of ordinances, most important in their influence, and minute in their details. The franchises, the privileges, the property of this great mass of citizens are, to a large extent, regulated and controlled by this extended code. The prosperity and peace of a great city are under the dominion of a body, endued with every species of political power—exercising legislative, judicial, and administrative functions; without one element of permanence, and with the slightest imaginable element of restraint.

To trace these powers to their source; to show where they yet rest upon the old foundations, and where upon modern legislation; where they have been respected and

* A. D. 1615. † Written in 1853.

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strengthened, and where they have been assailed and impaired—to exhibit how the revolutions of the State and the mutations of government have wrought upon them, as well as to set them forth in their present legal operation, is a task deeply interesting to every citizen; most useful, if worthily accomplished, and serviceable, even in the imperfection of its performance.

If any one will pay the slightest attention to the vast extent and great complexity of the rights of the Corporation of New York, and of the interests subject to its rule, he will conclude that few communities demand a more comprehensive, or a more clearly defined system of government. The Supreme Court of the State has thus spoken of it:

"The Corporation of New York differs widely from a private corporation; it more nearly resembles the Legislature of an independent State, acting under a constitution prescribing its powers."* And in another case,† Chief Justice Nelson says:

"The Charter of New York confers upon the Corporation many powers and privileges that belong to them in common with private companies or individual citizens, which they hold and enjoy, in the capacity of a private corporation."

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* 6 Wendell, 655.

† Britton *vs.* The Mayor of New York, 1843, now printed 21 Howard's Pr. Rep., p. 251.

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He enumerates the capacity of suing, of holding property, and of disposing of the same:

"The Charter also conferred upon them the ferries on both sides of the East River, and all others then and thereafter to be erected and established, all round the island, and all fees and perquisites appertaining or belonging thereto; also, all the ground between high and low-water marks on Long Island; and all the waste, unpatented, and unappropriated land within the limits of the city; together with the rights of dockage, wharfage, and all rents, issues, and profits arising or growing out of the same; also, all rivers, creeks, caves, ponds, &c.; fishing, fowling, hunting, &c., and all mines, minerals, &c., within the limits of the city."

"These grants, and many others that might be enumerated, constitute a large mass of private rights and interests, in various descriptions of property, real and personal, corporeal and incorporeal, held and enjoyed by the city, in the same way and in common with any citizen upon whom like property and franchises might have been conferred; and, within the limits of the grant, the Corporation may deal with the property, in the management and disposition of the same, in any way that would be lawful for an individual owner, and any contracts and engagements entered into by them, in the course of such management and disposition, would be as obligatory upon them, as upon an individual."

"On looking into the Charter, it will be found to embrace an extensive grant of political power, legislative, executive, and judicial, which, so far as granted, represent

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these great departments of the State Government, and which are lodged with the defendants in their capacity as a Municipal Corporation. The legislative power is conferred upon the Common Council. That body is empowered to frame, constitute, ordain and establish, from time to time, all such laws, statutes, ordinances, and constitutions, which to them, or the greater part of them, shall seem to be good, useful or necessary for the good government of the body corporate."

This is an outline of the great offices, duties, and authority of the Corporation of the city of New York.

The attempt of the author, in the following work, will be to explain the nature and extent of these powers and offices—to exhibit them in their practical operation upon the most material subjects to which they apply; and upon these subjects to present the law as it now stands, in its details as well as principles, as that law is to be found in charters, statutes, ordinances and decisions.

All the rights, powers, interests, and functions of the Corporation of New York may be arranged under the heads of Proprietary, Legislative, Executive or Municipal, and, as to some of its members, Judicial.

Although the present work is limited to the consideration of the position of the Corporation as Proprietors, yet that position, and the legal rights and powers attendant upon it, cannot be well understood without a careful examination of the Charters.

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In the first place, it is necessary to trace the sources of their powers. This involves the consideration of the Charters, the extent of authority under them, and the restrictions upon that authority.

The plan of the work is this:

First—An historical account of the Municipal Government; the successive Charters which were granted to the City; and their general provisions.

Their recognition by the Colonial Assemblies; and a view of the statutes made to conform, aid, amplify, or restrict them; their validity, at the period of the Revolution; the constitutional provisions of 1775, and subsequently, relating to them; and the effect of the Act of 1828, repealing the colonial law, upon them.

The general powers of the Corporation will then be classed and discussed; which of them are susceptible of legislative interference, and which of them are exempt from such control.

The authorities and decisions of our Courts, showing to what extent the legislative interposition has been sanctioned by them, will be fully stated; and from these, as well as the fundamental doctrines of the law, an attempt will be made to show in what cases the rights of the Corporation are inherent and irreversible; and where the power of the State may intervene.

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Some general propositions, as to the present force and operation of the Charters, relating to the legislative action as the source of several powers exclusively or concurrently, and the rule where they may possibly conflict, are then deduced.

These form the topics of the FIRST CHAPTER.

In the SECOND CHAPTER the territorial extent and jurisdiction of the city are stated.

The THIRD CHAPTER relates to the proprietary title and interest of the Corporation, under various heads, which are stated at the commencement of the chapter.

The FOURTH CHAPTER treats of the restrictions upon, and mode of alienation; and the position of the Corporation as Trustees.

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CHAPTER I.

THE CHARTERS—THEIR HISTORY, AND LEGAL FORCE.

SECTION I.

THE year 1615, when the first establishment was made by the Dutch on the southerly point of the Island of Manhattans, may be taken as the date of the foundation of the city of New York.

In 1621, the States General made a grant of the country to the West India Company. The powers vested in the Company were most extensive. They were, indeed, absolute, with the exception that governors-in-chief, and the instructions proposed to be given to them, were to be first approved by the States General, who were to issue the commissions; and oaths of allegiance were to be taken to their High Mightinesses as well as to the Company.*

The Company was divided into five separate Chambers of Managers; and an Executive Board of Nineteen Delegates was created. All the inhabitants of New Netherlands, as also of other countries, might become stockholders during the year 1621; after which, no new members were to be admitted.† In 1623, this Dutch West India Company went into full operation under its Charter. The first Director was CORNELIS JACOBSON MAY; the second, WILLIAM VERHULST. There is nothing connected with my subject to be noticed, during their period.

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* Broadhead's History of New York, First Period, p. 134, &c. † Ibid.

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THE CHARTERS.

In 1626, PETER MINUIT was appointed a Director. The College of Nineteen had previously intrusted to the Amsterdam Chamber, one of the five Chambers, the particular control of the North American Province.* But at this time very important principles of government were declared. They were the will of the Company, as expressed in instructions, or declared in ordinances; and in cases not thus specifically provided for, the civil law and the statutes, edicts, and customs of the Fatherland.† A Council of Five, to assist the Director, was appointed, and in the Director and this Body, all legislative, executive, and judicial power was vested, with an appellate jurisdiction to the Chamber at Amsterdam.

In 1629, WOUTER VAN TWILLER arrived at Fort Amsterdam. His commission was from the Lords States General of the United Netherlands, and the privileged West India Company. The government was lodged in him as Director, with a Council, and their powers were almost absolute.

In the year 1629, the Assembly of Nineteen, in Amsterdam, granted to the colonists a charter of Freedoms and Exceptions. By the 19th article, the colonists who happen to be on the respective rivers, shall be at liberty to appoint a deputy to give information to the commander and Council, of all things relating to the colonies.‡

It appears that a Board, or College of Twelve, was chosen under this article. The number was afterward reduced to eight. But this first body was dissolved and

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* Broadhead, p. 136.

† Moulton's History of New York. Broadhead, p. 163. O'Callaghan's History, vol. i., p. 101.

‡ O'Callaghan's History, vol. i., p. 101.

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extinguished by the mere will of the Director, and the latter was little heeded, and of no fixed authority.

It is not pertinent to the present work, to state anything more as to the office or acts of this body, except to notice, that in 1642 they demanded privileges for the city similar to those which, in 1652, were actually conferred. They stated that "the smallest village in Fatherland had a Board of from five to seven schepens, for the management of their local affairs."*

In the year 1645, the system of government was more carefully adopted. A Director-General and a Council, composed of a Vice-Director and Fiscal, were appointed; and the privilege of delegating one or two persons from the towns or villages, to give information to the principal government as to the state and condition of the settlement, was reconfirmed.†

In July, 1646, the commission of the States General was issued to PETER STUYVERSANT, appointing him Director-General, giving him power "to administer with the Council, as well now as hereafter, to be appointed with him, the said office of Director, both by water and by land." The powers conferred were of the most ample nature, and under them the Director and Council claimed and exercised almost absolute authority. The province was ruled by proclamation. The Director-General was appointed by the States General; the Vice Director and Fiscal, by the West India Company.‡

In 1647, a step was made toward a representation of the people in the government. An order of Council was

* O'Callaghan's History, vol. ii.

† Appendix O'Callaghan's History, vol. ii., p. 559. Instructions of the Commissioners of Nineteen of the General Privileged West India Company.

‡ O'Callaghan's History, vol. ii., pp. 17, 18.

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issued, allowing the people to choose eighteen persons, from whom the Director and Council would select nine, "as is customary in Fatherland," to give their advice when called on, and to assist in promoting the welfare of the country.*

The election was held, and in September, 1647, an act or charter, declaratory of their powers, was promulgated, a portion of which will be found in the note.†

It is true, that about fifteen years before, there was a faint indication of the republican principle of representation; but now the body became fixed, and gradually enlarged its authority.

During the struggle between the Director-General and a large party in New Netherlands, which continued for almost the whole of Stuyversant's government, the delegates, who presented a remonstrance to the States General, accompanied it with a separate petition, in which the colonists specified the several reforms they demanded. The first of these was "a Burgher or Municipal government, suitable to the province, and resembling somewhat the laudable institutions of Fatherland."

Provisional order, 1650.

The Committee of the States General reported in April, 1650, a provisional order for the government of the Province; one of the articles of which was, "that the Council of New Netherland should consist of one President or Director, one Vice Director, and three Counselors; whereof one should be appointed on the part of their High Mightinesses and the West India Company, and the other two to be selected from among the resident inhabitants of the country."‡ And another article (the 17th)

* O'Callaghan's History, vol. i., p. 36. † See Appendix, Note 1.

‡ O'Callaghan's History, vol. ii., pp. 133, 135.

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provided, "that there should be within the city of New Amsterdam a Burgher government, consisting of a Schout, two Burgomasters, and five Schepens."

In 1652, the Directors granted to New Amsterdam a municipal government, according to the recommendation of the Committee of 1650. It was to consist "of one schout, two burgomasters, and five schepens, to be elected by the citizens in the manner usual in this city of Amsterdam." Government of 1652.

The model furnished by the city of Amsterdam, was of a schout, four burgomasters, and nine schepens, besides a Council of thirty-six members. The fourteen first-named officers composed a Board or College, styled, "The Lords of the Court of the City of Amsterdam," and in these was vested the right to make all city laws and ordinances.*

The right, however, of this municipal body to frame the laws for the city was not immediately allowed. It appears that the Director General insisted, not only upon the power of appointing the members himself, but gave them to understand that their existence did not diminish his own authority, in conjunction with the Council, to make laws and ordinances even for the city.†

The burgomasters and schepens persevered for several years in an effort to procure the nomination of their own successors. They made repeated applications to the Directors in Holland for an enlargement of their powers under the charter. In 1653, an application of the latter character was granted. The excise of beer and wine was allowed to them, on condition that they paid the public salaries.

In 1656, the burgomasters of Amsterdam issued their "conditions" for the settlement of New Netherlands, ac- Conditions of 1656

* O'Callaghan's History, p. 210. † Ibid., p. 213.

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cording to an agreement with the West India Company.* By the 11th, and other articles, it was provided, "that the said fortified place allotted for the residence of the colonists, whether we call it a city or town, respecting the police, or distribution of justice, and especially the matter of descents, shall be regulated in the same manner as here in Amsterdam."

"They shall first have one schout or officer, as the head of justice, appointed in the same manner as here."

"The schout shall be appointed in the name of their High Mightinesses and the West India Company, by the Deputies of Amsterdam, who, for this end, by power of attorney, shall give authority to the Director."

"They shall, moreover, have three burgomasters, who shall be appointed by the Common Burghers, out of the most honest, fit, and rich—"

"And five or seven schepens, for which purpose the body of the burghers shall nominate a double number, that the Director, by attorney, as is mentioned in the 13th article, may make an election out of them."

There was also a provision, that when the city increased to two hundred families or upward, they should themselves choose a Common Council, of twenty-one persons, to meet the burgomasters and schepens.

In the year 1657, the law respecting Burghrect, or municipal freedom, was passed. This law has been adverted to by Chancellor Kent, and also in the proceedings of the City Convention of 1829, as the earliest Dutch charter. It was, however, in fact, a division of the citizens into two classes, and a modification of ancient regulations, by which an aristocracy, by purchase and otherwise, was established. It is well explained by Dr. O'Callaghan, in his history.†

* Collect. Historical Society, vol. i., p. 291. † See Appendix, Note 2.

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The province having been surrendered to the English in the year 1664, Governor Nicolls, the first English governor, granted an act of incorporation to the inhabitants, in the year 1665. The city was placed under the administration of a Mayor, Aldermen, and Sheriff.* Charter of Nicolls, 1665.

The Dutch having, in 1673, regained possession of the province, held it for a short period. During that time the Charter of Nicolls was revoked, and the old system restored. (Renckes and Evertson's Charter, 17th Aug., 1673, Docum. Hist. of New York, vol. i., p. 605. Colve's Provisional Instructions, August, 1673, ibid.)

The treaty of peace of 1674 reinstated the English in the possession of the colony; and in November of that year, Governor Andros issued a proclamation, declaring "that all former grants, privileges, or concessions, and all estates under his Royal Highness before the late Dutch government, were thereby confirmed." In October, 1675, Andros, by proclamation, and in virtue of the Duke's Letters Patent, appointed certain persons to be the Mayor, Aldermen, and Sheriff, with full power, among other things, "to rule and govern all the inhabitants of this city and corporation, and all strangers." Andros' Proclamation, 1675.

This was undoubtedly a recognition of Nicolls' charter, and an appointment of the functionaries under it, in order to remove doubts arising from the temporary dominion of the Dutch. I have collected, in a note, some useful and interesting proceedings of the Corporation under the charter of Nicolls. Their particular application will be hereafter stated.†

The next step in the history of the charters of the city, was taken in 1683. In November of that year, the Mayor, Aldermen, and Commonalty presented a petition to Lieu- Petition in 1683 for a Charter.

* See Appendix, Note 3. † Ibid., Note 4.

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tenant-Governor Dongan, praying for a confirmation of all charters, and for various other franchises and privileges. As a record of the claims of the Corporation, this document is important.*

Numerous discussions took place in that year between the Governor and the Common Council. One part of their application was referred to the Duke; and at last, on the 22d of April, 1686, the complete charter was granted, under which the city government was chiefly conducted, until the charter of 1730 was issued by Montgomerie.

Charter of 1683.

As every material clause of this charter of 1686 will be quoted in different portions of this work, it is only thought necessary here to state, that it confirmed fully all previous franchises, privileges and rights before bestowed by any charter or grant, and that various new and important privileges and interests were conferred by it. The preamble, however, is transcribed in a note.†

Effect of the Duke's accession to the crown.

A point which, it seems, gave rise to some distrust as to this charter, should here be noticed.

On the 6th of February, 1685, the Duke of York ascended the throne of Great Britain as James II.

The effect upon the ducal commission, and consequently upon the previous charters of Nicolls and Andros, is the point adverted to.

The patent to the Duke, of 1664, granted the tract of country described therein, including New York, "with all royalties, and all his Majesty's estate, together with the right of government." After the treaty of 1674 (the province having been conquered by the Dutch, in 1673), the Duke obtained another patent from the crown, dated the 29th of June, 1674. This was as comprehensive in its character as that of 1664; and the Duke's commission to

* Copied in note 5, Appendix. † Note 6.

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his governors authorized them to exercise every power which by the letters patent was granted to the Duke.

It is immaterial whether between February, 1685, and April, 1686, Dongan had received a new commission from James as king, or acted under his old commission from the Duke, given in 1682. Supposing the latter to have been the case, the Duke was the grantee of all royalties and right of government directly from the crown. He had conferred them, in the utmost extent, upon his governor. The accession to the throne of the individual, could not of itself revoke a commission so as to affect any rights conferred under it, before an actual revocation. It is clear that as king he could not repeal a charter granted in truth by royal authority, although delegated first to the Duke and next to the governor.

I am aware that it has been urged, in former times, that the accession of the Duke to the throne, merged what he had done as Duke in his kingly power; and that he could abrogate charters granted by him in that capacity. The doctrine is contrary to reason, justice and law. The crown cannot revoke or annul a patent granted directly by itself, (Burrows, 1656;) nor consequently a patent granted by its duly-constituted agent. The Duke was the grantee and agent of the crown for this purpose; the governor was his agent, and therefore the agent of the crown. When Charles II. assailed the charters of the realm, he did it through the forms of law, by a *quo warranto*, to which the courts lent themselves.* Other chartered bodies, intimidated or seduced, accepted new patents from him. In the reign of James II., it was asserted in the House of Commons, that "the compulsory substitution of new for

* Miller's Eng. Gov., vol. iii., p. 58.

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ancient charters, amounts to a disseisin of the subject of his freehold, without a trial."*

In Marshall's History of the Colonies, it is stated, that ineffectual efforts were long made to induce the General Court of Massachusetts to surrender the charter; but they resisted—"they deeming it better to die by the hands of another, than by their own." See also Pownall's History of the Colonies—54, 58.†

Yet there is a distinction to be here observed. Although every right conferred by the Duke's governors was irrevocable, yet when the Duke became king, the royalties which had been conferred upon him as Duke, vested in him as king. This is clearly expressed in the reply of Governor Tryon, to the questions addressed to him by the Board of Trade, in 1774. "By the grants of this province and other territories to the Duke of York, in 1663–4, and 1674, the powers of government were vested in him, and were accordingly exercised by his governors until he ascended the throne, when his rights as proprietor merged in his crown, and the province ceased to be a charter government. From that time it has been a royal government."‡

The result is, that the charters granted prior to that of 1686, under the ducal commissions, were unimpared by the accession of James to the throne; and that the charter of Dongan, even if bestowed under his commission from the Duke, was effectual to ratify them, as well as to confer any new interests or franchises. The presumption from the recital must however be, that he had a fresh commission from James as king.

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* Viscount Lonsdale, May, 1685; Lingard's History, vol. iv., p. 28.

† The observations of Mr. Sergeant, arbitrator in the Pea Patch case (Wallace's Rep., 138), are strong upon this point.

‡ London Doc., 44, Albany. Transcribed Valentine's Manual, 1851, p. 371.

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This charter of Dongan has received both legislative and judicial recognition; nor am I aware that its validity has ever been seriously impeached, nor of any ground on which it can be successfully assailed. This subject will, however, be more particularly noticed when the character of Montgomerie is discussed. (See *post*, this chapter.)

Effect of the Revolution of 1688.

The radical change in the government of England, resulting from the revolution of 1688, raised many points upon which doubts, real or imaginary, were based. The influence of this change was felt in the colonies. The act of Parliament (3 William and Mary, 1690) was passed for the quieting men's minds; recognizing William and Mary as the lawful sovereigns, and establishing the acts of the last Parliament.

Act of 1691.

In April, 1691, an act of the Assembly of New York was adopted for a similar purpose. It provided that all charters, patents and grants, made, given and granted, and well and truly executed under the seal of the province,* constituted and authorized by their late majesties, the kings of England, and registered in the Secretary's office, unto the general and respective corporations, or bodies politic, of the cities, towns, or manors, and also to the several and respective freeholders within the province, are, and forever shall be, deemed, esteemed, and reputed good and effectual charters, patents and grants, authentic in the law, against

* The first seal was one granted by the Dutch West India Company to New Amsterdam, in 1654. The next was a seal for the Province, and one for the city, given in July, 1669, by the Duke of York, "to be used upon all occasions for the sealing of warrants, grants, treaties, &c., which in any way concern the Province or Corporation of New York." In 1686, another seal was granted to the city, which remained until the Revolution. The seal of the Province of 1669, remained the seal until the accession of William and Mary, when one bearing their effigies was adopted; and this continued until 1705, when it was broken, and a new one transmitted from England.

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their majesties, their heirs and successors forever, notwithstanding the want of forms in the law, or the non-feasance of any right, privilege, or custom, which ought to have been done heretofore by the constitutions and directions contained in the respective charters, patents and grants aforesaid.

By the second section, "all the patents, grants and charters made, given and granted as aforesaid, unto all and every the several and respective corporations or bodies politic of the cities, towns and manors, and also unto all and every the respective freeholders, their heirs and assigns forever, within this province, are, to all intents and purposes whatsoever, hereby ratified and confirmed."

Opinion of Judge Wright upon this act.

In the able opinion pronounced by Judge Wright, in the case of The State *vs.* Livingston (January, 1851), there is a full exposition of this statute.

After stating the first two sections of the act, he discusses the point, which had been raised, that the statute was merely passed to save and assure corporate rights and privileges, notwithstanding such rights might have been technically lost by non-feasance, and also the rights and privileges of freeholders and cities, towns and manors, where the charters, patents, or grants, had been given either by the reigning house, or by the excluded house of Stuart; and was not intended to sanction any grants of lands to individuals. He thus concludes: "It is not doubted that the act confirmed, as against the crown, the charters, patents and grants to municipal corporations, or bodies politic, and the rights and privileges secured thereby to freeholders therein. The only doubt is, whether it was intended to apply to patents or grants of land to individuals. The language of the second section would seem broad enough to cover the last-named description of grants." After some further discussion, he expresses

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the inclination of his opinion to be, that, by the true construction of this statute, patents and grants to individuals were confirmed by this statute.

In the elaborate opinion of Judge Harris, in The People *vs.* Van Rensselaer (September, 1852), it is laid down: That the object of the act was two-fold; first, to quiet all apprehensions as to the validity of grants made by or under the authority of the sovereigns who had just been dethroned, and then to save the grantees from any forfeiture they might have incurred during the convulsions just passed. The colonial legislature intended to assure the colonists that their own rights should not be prejudiced by the revolution which had taken place in the mother country. The act was to confirm all titles which, under the former government, would have been held to be valid, and to re-establish such titles as during those troubles had been forfeited.

The learned Judge insists that the statute could not render valid what was before illegal.

Acts of the Legislature in aid of this Charter.

While the charter of 1686 was thus the source of the powers of the corporation, the aid of the Legislature was often found necessary for the proper enforcement of those powers. It is probable, also, that a jealousy, in the Assembly, of royal prerogative led to the interference of that body with the city government. This feeling is plainly traceable at a later period, although the statutes now referred to were generally needful for strengthening and aiding the Common Council. *

Acts of the Corporation under Charter of 1686.

Some historical notices of the acts of the corporation under the charter of 1686, both before and after the colonial act of 1691, will be found useful, as proofs of the powers then claimed and of the mode of exercising them. †

* See Note 7.

† Note 8.

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Charter of 1708.

The charter granted by Lord Cornbury, in 1708, related exclusively to the ferries, and to a grant of a strip of land on the Brooklyn side of the East River, between high and low water mark. This charter, and the petitions connected with it, will be hereafter stated in full.*

Charter of 1730.

Then, in 1730, the last and most important of the charters was granted by Governor Montgomerie. As all its provisions which fall within the scope of this work will be minutely stated under the appropriate heads, it is deemed useless to make here even an abstract of its contents. The previous steps taken by the Corporation, and the petition upon which it was granted, are, however, copied.†

A portion also of the preamble, as to the doubts which had been suggested respecting the previous charters, is also transcribed.‡

In relation to these doubts, it may be sufficient to observe, that the one founded upon the grants being by the governors, and in their names, if of any force at all, was obviated in Montgomerie's charter. The introductory clause is, "George the Second, by the grace of God, king," &c. But, in truth, the objection has no weight. The governor was authorized to grant and convey, and the great seal of the province was the evidence of the transfer. §

The objection arising from the different styles of the incorporated bodies would apply to the Dutch charters, and to those granted by Andros and Nicolls, but would not apply to the charter of Dongan, or of Lord Cornbury; both of which are to the Mayor, Aldermen, and Commonalty of the city of New York.

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* *Post*, ch. III., § 2. † Note 9. ‡ Note 10.

§ Bogardus *vs.* Trinity Church, 4 Sand. Ch. Rep., 735, and Judge Harris, in The People *vs.* Van Rensselaer.

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In the year 1732, this charter, with all others, was ratified and established by an act of the Colonial Assembly, transcribed in full in the note.* Act of 1732.

The charter of Montgomerie, with those it enumerated and confirmed, and this act of 1732, formed the foundation of the municipal government and of the rights of the Corporation, down to the Revolution and the constitution of 1777. Various statutes were passed within that period, to endue that body with new powers, or to aid in the exercise of those before possessed. A reference to some of the most important of these, and which appear to involve some principle, is made in the note.† A more particular statement of these provisions will be found under particular heads.

At this period—on the eve of our great political reformation—we may usefully pause and inquire, on what foundation did the rights and powers of the Corporation then rest, and what was the legality and strength of that foundation? Position of the Corporation at the Revolution, 1776.

And upon this subject the statute of 1732 is of such high importance, that it becomes an essential inquiry, whether there was anything to impeach its validity or force. If there is nothing, it is then (as will be afterwards particularly dwelt upon) a charter given by the whole power of the government—equivalent to an act of Parliament—and is an adoption and sanction, by reference, of every grant, property, right, and power, given by any preceding charter.

There has never been a suggestion impeaching this statute, as I believe, except what is found in the Municipal Gazette, of June 24th, 1846. A letter is there transcribed, written by Governor Cosby, to the Board of Trade, dated

* Note 11. † Note 12.

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the 29th of August, 1733, stating that he had signed the act of 1732 without being sufficiently acquainted with its contents; making some objections to it, and suggesting that the Lords should not act upon it, until he could write further.*

The editor observes that the law was never acted upon by the Home Government, and therefore was not a law.

But this is clearly a mistake.

1st. The law is printed in the Revision by Smith and Livingston, as in force. They were authorized and directed to compile all such laws as were in force in 1752.

2d. It is found in all the editions of the laws by Bradford, who in 1729 was appointed printer of the laws then in force. (Edit. of 1735, 1763, 1765.)

3d. It is also printed in Jones & Varick's edition, as not re-enacted or repealed; but, as they state in the preface, forming part of the then existing laws of the State.

4th. *Again*, it is a mistake to say, that the acts of the Colonial Assembly did not become laws until approved by the king. On the contrary, with some special exceptions (very doubtful as to their legality), the laws passed by the Assembly, and ratified by the governor and council, must have been disaffirmed expressly by the king in council, or they were binding.

The commissions to the governors prove this. I transcribe a part of that issued to Sir Danvers Osborne, the governor in 1753.†

So in the reply of Governor Tryon, in 1774, to certain questions of the Home Government, he says, "All laws proposed to be made by the Provincial Legislature pass through each of the houses of Council and Assembly, as bills do through the Houses of Lords and Commons, in

* See Note 13. † Note 14.

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England; and the governor has a negative voice in the making of all such laws. Every law so passed is to be transmitted to his majesty, under the great seal of the Province, within three months or sooner, after the making thereof, and a duplicate by the next conveyance, in order to be approved or disallowed by his majesty; *and if his majesty shall disallow any such law, and the same is signified to the governor under the royal sign-manual, or by order of his majesty's privy council, from thenceforth such law shall become absolutely void.*"

There is also a striking proof of this position, in the instructions to Governor Cosby. He was especially directed not to give his assent to any bills for loaning the credit of the colony, issuing paper money, &c., but to forward them to the Board of Trade, to be examined and submitted to the king. The royal approbation communicated to the governor was in these special cases prescribed as a restriction of his power, and implies plainly that his assent, in general, was all that was necessary to constitute a law. (Journals Assembly, vol. i., p. 679.)

The act of 1691 (which continued in force until 1697), declaring the rights and privileges of the inhabitants of the Province, provided, that all bills agreed upon by the representatives, or the major part of them, shall be presented to the governor and council for their approbation and consent. "All and every such bill, so consented to by the governor and council, shall be esteemed and accounted the laws of the Province; which laws shall continue and remain in force until they be disallowed by their majesties, their heirs and successors, or expire by their own limitations."

There can be no doubt that this was the constitutional theory of the Colonial Government, from 1683 down to the date of the Revolution. Whatever may be traced, appear-

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ing repugnant to it, was an encroachment of the crown, or the doctrine of ultra prerogative advocates. The proposition here urged has been since recognized in The People *vs.* Trinity Church, (22 N. Y. Rep., 44.)

This act, then, being clearly unassailable, its important clauses are next to be considered.

The first section is of itself sufficient to constitute a corporation.

The clause, that "The Mayor, Aldermen, and Commonalty shall continue, and remain, *and be* a body corporate, by the name of," &c., would erect a corporation, even if every charter was utterly and irremediably void.*

The second section declares and enacts, with the whole strength of legal language, used by the whole power of the government, "that every charter, patent and grant, before made to the Mayor, Aldermen, and Commonalty of the city, is valid, effectual and legal."

But, lest this might be trenching on the judicial power, the third section, in the same full and perfect manner, ratifies and confirms every such charter, gift, patent, or grant.

And then by the fourth section it is provided, "that the Mayor, Aldermen, and Commonalty shall have and enjoy every right, gift, power, liberty and hereditament theretofore given unto the said Mayor, Aldermen, and Commonalty, by any letters patent, charter, gift, or grant, under the seal of the colony."

In effect, then, this is a grant of every power, property and right enumerated and sought to be conferred in any previous charter under the Colonial seal. The charters, then, serve (even if they amounted to nothing else) as a schedule annexed to the act—as the list or specification of

* Sutton Hospital case, 10 Rep., 28, 30.

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everything bestowed or professed to be bestowed. Thus we have, in fact, an absolute new grant by the government, comprehending every grant in the previous charters, as if the same had been embodied and literally repeated in it.

Effect of the Revolution.

We are now brought, in the history of the charters, to the period of the Revolution, and to the consideration of the effect of that great event upon their validity and force.

It is well known that a class of public men in several of the States, as distinguished for their ability as for the evil tendency of their political principles, sought to pervert the American Revolution, from an emancipation from arbitrary rule and a reformation of the government, into an absolute dissolution of all previous obligations. Unhappy memorials of this destructive doctrine are to be traced in the legislation of many States, and even in the adjudications of several tribunals. It could not but happen, that royal charters would be looked upon with jealousy, and assailed with vigor. To resist this spirit of subversion—to uphold the public faith plighted to individuals and communities, and to perpetuate the obligations of contracts—engrossed the exertions of the wise and the true. It is to the honor of the framers of the constitution of New York, in 1777, that they expressly provided, "that nothing therein contained should annul any charters to bodies politic made prior to the 14th of October, 1775."

Constitution of 1777.

The constitution of 1821 contained the same provision, changing the phrase "bodies politic" into "bodies politic and corporate," and the same phraseology is used in the constitution of 1846.

The import of these provisions is this: that the constitution, which embodied the will of the people as to the

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alterations in the former system of government—in other words, the Revolution itself—was not to impair or affect the legality or force of the royal charters. It gave the greatest sanction and the most immutable character to a principle, which subsequently was adopted in the highest tribunals of the States, as an essential doctrine of law and justice. That principle is this. The people of the respective States had succeeded to all the privileges of the crown. The transition was natural and complete. The political power survived, although the king's authority had expired. The maxim of the French monarchy—*Le Roi meurt, Le Roi vie*—was applicable. But, in succeeding to royal dominion, the States became subject to royal obligations. They could not assume the power, and be absolved from the duties; nor enjoy the rights, without fulfilling the contracts. They came in, not by conquest, but by descent.

It must be noticed, that the constitution of 1777 also provided, "that all the Colonial laws in force on the 19th of April, 1775, not since repealed, expired, or altered, were to be and continue the law of the State, subject to such alterations as the Legislature should make respecting the same."

Repealing act of 1828.

On the 10th of December, 1828, the Legislature passed a law, that "no statute passed by the government of the late colony of New York shall be considered a law of the State."

It cannot be contended, that this sweeping repeal was sufficient to annul the colonial act of 1732, so far as it sanctioned or conferred a charter upon the city. Let it be again noticed, that the language of the first section creates a Corporation of the Mayor, Aldermen, and Commonalty; so that if all the charters were at the time positively void,

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and the Mayor and Aldermen usurpers of a franchise, yet this act, by its own single virtue, would have endued them and the Commonalty with a corporate existence. And then the charters would only have sufficed, but clearly would have sufficed, as a schedule or enumeration of the rights and powers thus conferred by the act. In this view, and even in relation to such powers of a municipal corporation as most plainly are under legislative control, the act of 1828 cannot avoid or impair the statute of 1732.

1st. Because it may well deserve argument, whether one universal repeal of every colonial act was justly within the power given by the constitution. It seems far the most natural construction, that the alterations were from time to time to be made in the acts respectively, and not that an entire abrogation of the whole of them, at once, was contemplated.

2d. Again, it was utterly impossible for the Legislature to have impaired those portions of the charters, and of course those portions of the act, which bestowed or confirmed rights and interests in property. The legal presumption is, that they did not mean to do so, and therefore did not intend to bear upon this act at all.

3d. It is presumable that the act of 1828 referred to the general statutes which had been passed for the government of the whole Province, not to special acts conferring particular rights or privileges. No doubt a principal reason for passing this statute was, that it was presumed the acts of the Legislature had covered all the points and matters of important colonial legislation.

And lastly, it may be stated, that the Legislature can only interfere with a charter by a direct repeal—by a direct alteration—or by an express special enactment on a particular branch of power, inconsistent with the retention or exercise of such power under the charter; and this only

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in cases in which it possesses legislative control at all. This act was in effect a charter from the State—a granting charter—a confirming charter—a perfect charter.

It is also deserving of notice that, in the constitution of 1846, the identical language of the constitution of 1777 and 1821 is employed. The colonial laws, not repealed, expired, or altered, were to continue the law of the State, subject to such alterations as the Legislature should make concerning the same. I prefer to place the present legal existence of this act upon such considerations, rather than upon the saving provision of the fifth section of the general repealing statute of 1828, declaring "that the repeal of any statutory provision should not affect any act done, or right accrued or established."

Rights of the Corporation under the act of 1732.

The Corporation of New York might, then, rest its rights and privileges upon the foundation of this statute, if everything else failed. If, by any possibility, the former charters could be impeached, the act in question never can be. It is complete in itself, by creating a corporation, and by adopting (by way of reference) every grant contained in the charters, as if each and every grant had been particularly enumerated in its very language.

Thus, by a successive process of adoption and ratification, we find the very earliest charter of the English government, and all its provisions, made legal and operative. The charter of Nicolls was recognized and sanctioned by the charter of Dongan. The act of 1691 ratified and confirmed both, expressly curing all defects of form. Treat every objection recited in the charter of Montgomerie as an unanswerable objection to the previous charters, and fatal to their legality, then the charter of Montgomerie has recapitulated, regranted, and fully conferred them. It operates either as a confirmatory grant, ratifying and re-establishing what was voidable, or, as a new charter, be-

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stowing rights enumerated in instruments absolutely void. In either case it remains the valid and lawful source of all the franchises specified and repeated, or freshly bestowed by it.

Again, suppose the charter of Montgomerie was, by any possibility, impeachable, the act of 1732 has sanctioned it, if voidable, or has conferred the identical powers and rights, if void. It is a new charter, or a confirmatory charter, or it is both.

But these charters could never have been anything but voidable; and voidable only upon regular judicial proceedings for original invalidity, or a forfeiture incurred. It is sufficient in the present instance to refer to the clear opinion of Justice Wright, in the Livingston case, before cited, and to the decision of the Supreme Court of the United States in The United States *vs.* Arrendondo, 6 Pet., 542.

As far as they operate as grants of property, the principles laid down by the Supreme Court of the United States, in the Arrendondo case, are decisive. The grants of the colonial governors, before the Revolution, have always been and yet are plenary evidence of the grant itself, as well as of the authority to dispose of the public lands. "The actual exercise of authority to make a grant, without any evidence of a disavowal, revocation, or denial of the king, and his consequent acquiescence or presumed ratification, are sufficient proof, in the absence of anything to the contrary, of the royal assent to the exercise of his prerogative by his local governors."

The constitution of 1777 recognized and guarded the statute of 1732, as a charter, as much as it did that of Montgomerie; and from that moment the rights and franchises of the city of New York were placed beyond the reach of future change, by either a constitution, or a

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statute, with those exceptions in which every charter is inherently subject to legislative control.*

Charter of 1830.

The affairs of the city were conducted under these charters, and various auxiliary acts of the Legislature, until the year 1830, when the amended charter of that year was adopted. A resolution of the Common Council was passed on the 23d of June, 1829, recommending to the citizens to meet in their several wards, and to choose delegates to a convention, for the purpose of amending and revising the charter in force.

The great importance of the suggested amendments, as well as the propriety and popularity of the measure, led to this recommendation.

After the deliberations of the convention were finished, a resolution was adopted on the 18th day of September, 1829, directing the transmission of the amendments to the Common Council, with a request for the passage of an ordinance, submitting the same to the electors for their approval; and it was also resolved, that, in case the amendments were approved, a committee should transmit the same to the Legislature, with a request, in the name of the people of the city, that the same be passed into a law, and that such committee transmit the amendment, so approved, to the Common Council, and ask their aid in procuring such law. (Journals of Convention, 335, 336.) Perhaps the proposition of Mr. Pigott, by which the Common Council should have the whole charge of the proceeding, was most regular.

The Common Council carried out the suggestions of the Convention, and applied for the act to the Legislature; which act was passed on the 7th day of April, 1830.

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* Since the foregoing pages were written, a pamphlet has been published, assailing all the charters, and denying their legality. An examination of the very singular propositions contained in it will be found in the Note 15.

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While thus the assent of the incorporators to the amendments was obtained in the most authentic manner, the authority of the charter, as amended, still springs from the Legislature. The people of the city and the Common Council of the city could no more amend an act of incorporation, than they could originally have conferred upon themselves a corporate capacity. The whole State is interested in the establishment of such bodies; and hence the power of the crown, in this particular representing the State, and of the Legislature, since that power has ceased, is indispensable. Nor is it a necessary conclusion that the assent of the people, thus obtained, was essential. Their assent, by representation through the Common Council, it is supposed, would have been sufficient.

But, however this may be, it is clear that, so far as the power of the Legislature is concerned, the case is in nowise affected by these proceedings to obtain the approbation of the citizens. The question, as to its authority to interfere with the amended charter, is precisely the same as it *was under the former charters.*

The contract under the former was with the inhabitants and citizens of the city of New York, incorporated into one body politic and corporate, by the name of the Mayor, Aldermen and Commonalty of the city of New York. (Preamble to Montgomerie's charter.) And, by the first section of that charter, it was declared that the Mayor, Aldermen, and Commonalty, and their successors, should be and remain one body corporate and politic, *in re facto et nomine*, by the name of "the Mayor, Aldermen, and Commonalty of the city of New York."

The Legislature in the amended charter recognize the old one as subsisting; speak of the Common Council as a body in existence; and add to, vary, and restrain the exercise of powers before possessed. This is indeed, in a general

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sense, a contract; and, in several particulars, a contract in the strictest acceptation. But it is just such a contract as the former charters formed—a contract, that, as to every matter within the scope of the charter as amended, no change could be made by the Legislature solely, except where by settled rules of law it possessed the power of alteration. Whether it had such power, and in what cases it had it, is a different question; but a question standing, after 1830, precisely as it stood before.

By the 26th section, "such parts of the charter of the city of New York, and the several acts of the legislature, amending the same, as are not inconsistent with the provisions of the law, shall not be construed as repealed, modified, or in any way affected thereby, but shall continue and remain in full force."

The amendments essentially relate to the organization of the Common Council, and the regulation of its legislative action. It is not deemed necessary to transcribe this charter, as its provisions will be hereafter separately considered.

Rejected Charter of 1846.

In the year 1846, an attempt was made to amend the charter in a very extensive manner. A statute was passed on the 9th of May, 1846, to provide for the calling of a convention in relation to it. It provided for the selection of delegates from the several wards, to meet in convention, and that the charter or amendments proposed should be submitted to the people at an election, to be held on the first Tuesday after the first Monday of November, in the year 1846. The statute possessed this new feature: that the convention might make and submit an entire new charter, or suggest amendments only. If the charter or amendments were adopted by a majority of the votes cast on the question, it or they were to be submitted to the Legislature for approval at the next session; and, if

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so approved, should become the charter, or part of the charter, of the said city. An election of delegates took place, and a convention reported and submitted amendments on the 26th of October, 1846. They were, however, rejected. The instrument they proposed was cautiously and, in many points, wisely prepared. The first section declared, "that the Corporation, or body corporate, now existing and known by the name of the Mayor, Aldermen, and Commonalty of the city of New York, shall remain and continue to be a body politic and corporate by such name," &c. In the address of the convention to the people, they wisely say: "In determining the extent to which their work should be carried, they were deeply impressed with the importance of retaining the present chartered rights of the city, and came to the conclusion that they ought not to endanger those rights, and the privileges now possessed by the city, by again submitting them to a legislative ordeal."

Amended Charter of 1849.

On the 2d of April, 1849, another amendment of the charter was made by a legislative enactment. The alterations were of considerable importance, but relate mainly to the legislative power of the Corporation, its mode of exercise, and the creation of various departments for the better execution of its municipal powers. All these will be hereafter particularly noticed. This act was applied for by the Common Council, as will be seen in the proceedings of January, 1849. It provided (§ 29) for its being submitted for the approval of the electors, and declared that "if a majority of all the persons voting thereon should vote in favor of the amendment, the act should become a law; if otherwise, it was to become null and void." Thus the Legislature gave its previous assent to the amendments, dependent upon the adoption of them by the electors. But still the amendments were the emanations of the legislative power.

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By the 28th section, "all such parts of the charter of the city of New York, and the several acts of the Legislature amending the same, or in any manner affecting the same, as are inconsistent with this act, are hereby repealed; but so much and such parts thereof as are not inconsistent with the provisions of this law shall not be construed as repealed, altered, or modified, or in any form affected hereby, but shall continue in full force and virtue."

Amendment of 1851.

On the 11th of July, 1851, a further amendment of the charter took place, solely by the legislative authority.* There was no application by the Common Council for its passage.

By this statute, the third section of the act of 1849 was amended, by directing monthly sessions instead of three stated sessions. The 20th section was also amended as to the election of Heads of Departments; and there was a new provision to meet the case of a neglect to nominate the Chief of Police. The provision as to the Chief of Police will be discussed in this chapter, *post*, Subd. 30.

By an act of the 10th of April, 1852, all that portion of the second section of this act which related to the appointment of the Chief of Police was repealed.

The next material amendment of the charter took place under an act of the 11th of April, 1853. (Laws 1853, ch. 217.) It is not necessary for this work to notice any portions of it, except the 7th section, relating to the leasing and sale of the corporate property, which is discussed *post*, ch. iv.

Again, important changes were made by the act of April 14, 1857. (Sess. Laws, ch. 446.) The 38th and 41st sections are noticed under the same head. This act was not submitted to the people of the city for ratification. The acts amending the charter, passed April 7, 1830, April 2,

* Sess. Laws, 1851, ch. 543.

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1849, July, 1851, April 12, 1853, June 14, 1853, were repealed, and all laws inconsistent with the act were also repealed; but the charters of the city of New York, known as the Dongan and Montgomerie charters, so far as the same, or either of them, were then in force, were to continue and remain in full force.

By an act of the 15th April, 1861 (Sess. Laws, ch. 268), Commissioners were appointed to consider and adopt such amendments to the charter as to them should seem necessary, and conducive to the good government of the city and welfare of the inhabitants. Section 4 provides for the submission of the charter, as amended, to the electors of the city, and, if approved, for its transmission to the Legislature, and, if enacted by the Legislature, that it go into effect on the 1st day of May thereafter.

SECTION II.

GENERAL POWERS—LEGISLATIVE INTERFERENCE.

General propositions as to powers of the Corporation

I have thus reviewed the history of the charters and confirmatory acts of the State; and, upon the nature and extent of the powers of the Corporation, the following propositions appear deducible.

1st. Upon every question as to its power, the charters are the earliest and primary authority. If the power is clearly conferred by all or either of them, it is then to be inquired, whether that power has been withdrawn or modified by an act of the Legislature.

And here the important question is to be solved, whether it is a power which the Legislature is capable of withdrawing or curtailing.

2d If the power is within the scope of legislative ac-

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tion, and has been made the subject of an enactment, then the statute of the State becomes the source of the authority, and will be such source, either exclusively or concurrently.

It will be so exclusively, when the power in the charter has been expressly abolished (a case of rare occurrence, if it has ever occurred); or where, by a necessary inference from an enactment, it is abrogated or superseded. And it will be so concurrently, where the Legislature has not abrogated the power, but has enlarged or modified it.

3d. Most of the legislative acts are, however, of a different nature. In these the powers originally conferred by the charters are not in any manner touched or affected; but the Legislature has regulated the exercise of the power, and directed the course of proceedings under it. These enactments have generally been made upon the application of the Corporation itself, and for the purpose of obtaining aid in the enforcement and exercise of its authority, when the charter had not provided a mode, or an efficient mode, and the ordinances which could lawfully be passed were supposed not to be adequate.

In all such cases the acceptance of the act of the Legislature expressly, or proven by action under it, is a recognition of the power to pass the law; and several propositions result from this.

The legislative provisions must supersede any ordinances of the Corporation, incompatible with them.

They must also supersede the right afterward to pass ordinances also inconsistent.

But if the Legislature has not exhausted the subject—has omitted to pass regulations upon some particulars within the scope of a chartered power—the Corporation may, as to those points, pass ordinances.

4th. There may be the case of a power granted in the

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charter, as to which no legislative provision has ever been made. In such a case the charter is the sole fountain of the right, and the general authority to pass ordinances necessary to execute a power defines the character of the by-laws through which it may be exercised.

5th. And lastly, there is a class of cases, in which the power is not to be found in the charters at all, but has been bestowed originally and solely by the Legislature.

1st. Upon this subject it may first be noticed that, in our State, the validity of royal charters, as a source of rights to lands and property, has been fully and repeatedly recognized.*

The great doctrine of the Dartmouth College case and others of a similar character is next to be adverted to. I state it in the language of Chancellor Kent.†

"In respect of public corporations, which exist only for public purposes, as counties, cities and towns, the Legislature, under proper limitations, have a right to change, modify, enlarge, or restrain them; securing, however, the property for the uses of those for whom it was purchased. A public corporation, instituted for purposes connected with the administration of the government, may be controlled by the Legislature, because such a corporation is not a contract within the purview of the constitution of the United States.

"In these public corporations, there is in reality but one party, and the trustees or governors of the corporation are merely trustees for the public. A private corporation, whether civil or eleemosynary, is a contract between the government and the corporators, and the Legislature cannot repeal, impair, or alter, the rights and privileges conferred

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* Jackson *vs.* Ingraham, 4 Johns. Rep., 181; Jackson *vs.* Waters, 12 ibid., 366; La Frambois *vs.* Jackson, 8 Cowen.

† Comm., vol. ii., p. 305.

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by the charter, against the consent and without the default of the corporation, judicially ascertained and declared. This great principle of constitutional law was settled in the case of Dartmouth College *vs.* Woodward; and it had been asserted and declared by the Supreme Court of the United States, in several other cases, antecedent to that decision. Fletcher *vs.* Peck (6 Cranch's R., 88). The State of New Jersey *vs.* Wilson (7 Ibid., 164). Ferret *vs.* Taylor (9 Ibid., 43). Town of Pawlet *vs.* Clark (Ibid., 292). Grants of property and of franchises, coupled with an interest to public or political corporations, are beyond legislative control, equally as in the case of property of private corporations. Story, in Dartmouth College *vs.* Woodward (4 Wheaton, 697, 700). Town of Pawlet *vs.* Clark (9 Cranch's R., 292)."

It is next to be observed, that the constitution does not exempt charters from legislative interference and control, whenever, upon principles of law, such interference and control would be valid. Whatever that authority may be, it is equally extensive in its application to a royal charter as to a previous statute. The recognition of the charters in the constitution does not impair that power. The whole provision is, that nothing therein contained shall be construed to annul any charter to bodies politic or corporate, made by the king. It gives no new right; it exempts from no previous control. It preserves charters as they then existed, unshaken by any of its own provisions, and it leaves them subject to every principle of law, which can rightfully affect them.

One proposition on this subject admits of no dispute. If the grant is of property or of a franchise, coupled with a right to property, or the fruits of property, it is beyond legislative power; with the exception to which all property is subject, of the exercise of the right of eminent domain.

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Upon this principle, all the real estate given in the charters—all that has been subsequently lawfully acquired —all the soil under water around the island from high water mark to four hundred feet below low water, and, as I conceive, the soil between high and low water on the Brooklyn shore, from Red Hook to the Wallabout, are protected.

It is also conclusively settled that the right to ferries, around the island and across to the East River, is equally secured. (See *post*, Title "Ferries.")

The right in the Croton Aqueduct has been determined to rest upon the same footing.* The character of the rights in streets is considered *post*, Chapter III.

On the other side, it must be admitted that some of the franchises and powers of the Corporation are subject to legislative control. The difficulty is in making the discrimination. Where the Legislature has the power, it is not a question of compact and acceptance, but the exercise of an absolute right.

The general rule is thus stated: "Public corporations which exist for public purposes, such as towns, counties, &c., the Legislature may change, enlarge, modify and restrain, securing, however, the property for the use of those for whom it was intended." (4 Wheaton, 418.) "Political powers, conferred upon a corporation for the local government of a place, are not vested rights as against the State, and may therefore be abrogated by the Legislature, as well by a general law affecting the whole State, as by a special act altering the powers of the Corporation." (13 Wendell, 325.) "And upon this principle of the supremacy of Parliament has the important statute called the municipal corporation act been passed." (6 William IV.) By the first section, all laws, statutes, usages, charters, grants and

* Bailey *vs.* The Mayor of New York, 3 Hill, 531.

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letters patent, inconsistent with the provisions of the act, were repealed and annulled. Its provisions are numerous, and affected many corporate powers and privileges. As to the income of the property of a vast number of corporations, are prescribed many new regulations, although any interference with the capital was guarded against. (See, upon this statute, The Attorney General *vs.* Aspinwall, 1 Mylne and Craig, 613; Attorney General *vs.* The Corporation of Pool, 2 Keene, 170; 4 M. and Craig, 17; particularly the report of the case in 4 Mylne and Craig.) So the statute of the 6th George I., chap. 91, is a striking illustration of the power of Parliament over the king's patent. An express statutory provision was necessary, to enable the king, in any subsequent patent, to make corporators liable for the debts of the Corporation (§ 2); clearly showing that such a provision, without a statute, would be contrary to the common law and void. See also the recital in the act, 4 and 5 William IV., chap. 94. The following cases will also show the regard to private rights, united with the assertion of a power over municipal corporations, evinced in that act. (Regina *vs.* Liverpool Corporation, 3 Nev. and Perry, 280; *Ex parte* Harry, Ibid., 159.)

The case of Bailey *vs.* The Mayor of New York (3 Hill, 531), is very full and instructive upon the general question. The point was as to the powers and rights of the Corporation in relation to the Croton Aqueduct. Chief Justice Nelson adverts to the grant of powers to a municipal body for mere public purposes, as to counties, cities and villages, where the corporations have no private estate or interest in the grant. He says "that powers of this description may be blended with the rights of property, such as are given to a private company or an individual, in the same body. If the grant is for purposes of private advantage or emolument, although the public may derive a common benefit

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therefrom, the Corporation, so far, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons, upon whom the like special franchises had been conferred. It is upon the like distinction that municipal corporations, in their private character as owners and occupiers of houses and lands, are regarded in the same light as individual owners, and dealt with accordingly."

So in the Regents of the University *vs.* Williams (4 Gill and John., 388), Justice Buchanan says, "that a corporation may be private, and yet the act or charter contain provisions of a merely public character, introduced solely for the public good, and as a general police regulation of the State. Such is the statute 24 Henry VIII., ch. 5, creating the College of Physicians and Surgeons, in London."

Justice Grier, in Randall *vs.* The Delaware and Raritan Canal (Wallace's Reports), says, "In the popular sense of the term, nearly every corporation is public, inasmuch as they are all created for the public benefit. Yet, if the whole interest does not belong to the government, or if the corporation is not created for the administration of political or municipal power, it is a private corporation. Thus all bank, bridge, turnpike, railroad and canal companies, are private corporations."

"A public corporation is one that is created for political purposes, with political powers, to be exercised for purposes connected with the public good, in the administration of civil government."

And in Britton *vs.* The Mayor of New York, before referred to, Chief Justice Nelson points out the extensive grants of private interests and rights, which the Corporation hold exactly as an individual would hold them, and the public political powers vested in it, in like manner as in a purely public body.

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In Brown *vs.* Hammell, 6 Barr Penn. Rep., 92, Justice Coulter says, "There can be no doubt that the Legislature possesses the power to alter the charters of such bodies corporate as concern the welfare of the body politic, such as concern the administration of government, and are emphatically public. Such are the corporations of cities and boroughs where no private rights of property are involved, except incidentally, and such as can easily be reserved and compensated. But in relation to private corporations, the rule has been well established to the contrary. They are considered in the nature and entitled to the character of contracts between the government and individuals."

Thus, then, the Corporation of New York unites in itself a great variety of powers, peculiarly appropriate to a political corporation, and a great extent of rights, interests, and franchises, held in a private capacity.

State decisions, &c., upon the chartered rights.

I shall now endeavor to state in detail the cases in which it has been held directly, or inferentially, that the Legislature has the power of interfering with the charters.

In Sutton *vs.* Sutton, cited by Chancellor Kent (Notes, p. 149), it was held by the Superior Court of the city of New York (Jones presiding), that the statutory provisions authorizing the appointment of measurers of grain, and regulating the measurement, superseded the power given in the charter to appoint measurers.

That power was conferred by the 19th section of Montgomerie's charter, giving and granting to the Mayor, Aldermen, and Commonalty, "the office of measurer of and in the said city, to measure salt, wheat, oats, and other grain, and all other merchandise, measurable, or to be measured within the said city. To have and to hold the said office (and others) and to exercise the same by themselves or their deputies, and to take and to receive to themselves, all fees, profits and perquisites to the said offices,

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due or to become due, and all the fines and forfeitures to be laid concerning the same."

An act of the Legislature was passed on the 14th of April, 1832 (Sess. Laws, p. 219), which regulated the measurement of grain in the city, and directed the appointment of a Measurer General, and between ten and twenty measurers, by the Governor, with the consent of the Senate. The act also declared, that no person, except those appointed under it, should measure any grain in New York for hire or reward.

By the 4th section, the measurer who performed the services was entitled to seventy-five cents for every hundred bushels measured by him.

Chief Justice Jones delivered the opinion of the court, and held, that the grant to appoint measurers was a grant of political power coupled with no interest, save the fees as a compensation for measuring; and that the grant was not to be considered in the light of property, or intended as a source of revenue; that the legislative act was valid, and the grant in the charter so far controlled.

This decision was made before 1836. It may be observed, that one point determined by the court, in Maryland, in the leading case of The Regents, &c., *vs.* Williams, 9 Gill and John., 366, and hereafter stated, coincides with this decision of the Superior Court.

Chancellor Kent observes, that "if this were the true construction of the power of the Legislature over the charter, the same rule would seem to apply to every other part of the section, for the whole rests upon the same principle. It was a strong case to show the dependence of charter franchises on legislative discretion, except where the franchise is a matter of private interest."

On the first of May, 1835, a statute was passed for appointing measurers of merchandise in New York, in the

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same manner as by the act of 1832. But on the 16th of May, 1836, another statute was passed, which, by implication, admitted a concurrent power in the Corporation to appoint such measurers.

We find, in the ordinances of 1839, a provision for the appointment of fifty-two measurers for the city, and the fee for measuring grain or salt was fixed at seventy-five cents the bushel.

And so, in 1845, this ordinance, with some variations, was renewed.

The construction of the act of 1836 has probably, therefore, led to the conclusion, that the power of appointing measurers of grain was concurrent.

But now, by the 8th section of the 5th article of the constitution of 1846, "(§ 8) all offices for the weighing, gauging, measuring, culling or inspecting any merchandise, produce, manufacture, or commodity whatever, are abolished, and no such office shall hereafter be created by law; but nothing in this section contained shall abrogate any office created for the purpose of protecting the public health, or the interests of the State in its property, revenue, tolls, or purchases, or of supplying the people of the State with correct standards of weights and measures, or shall prevent the creation of any office for such purpose hereafter."

Another case of importance is that of The Mayor, &c., *vs.* Orderau (12 Johnson Rep., 125). A statute had been passed in 1801, for the better government of the city, and to grant certain additional powers to the Corporation; among others, to regulate the keeping of gunpowder, and providing for the forfeiture thereof if the same was kept contrary to law. They were also empowered to impose a penalty. The counts of the declaration, which were demurred to, set forth breaches of the ordinance in keeping

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one thousand one hundred pounds of gunpowder at one time, within the prohibited limits, and demanded the sum of one thousand three hundred and seventy-five dollars.

The court declined expressing an opinion whether, under the act, the Corporation could impose a penalty as well as the forfeiture; being of opinion that the power conferred by the act had not been properly executed. That it was clearly the intention that only one penalty of two hundred and fifty dollars should be exacted for any one offense, for a violation of the by-law in any one transaction.

"If it be conceded," says the Chief Justice, "that the by-law in question was authorized by the general powers conferred by charters, yet the application of the Corporation to the Legislature, and the latter having, in several instances, legislated on the subject of the by-law, operates as a limitation to any general and undefined powers in the charters."

In the Mayor *vs.* Nichols (4 Hill, 20), a general statute (2 R. S., 574, § 6, 1830) abolished in effect the inspection of hay over the whole State. The Corporation of New York passed an ordinance in 1839, making it the duty of the inspectors to cause all pressed hay to be inspected and weighed, and prescribing a forfeiture of five dollars for every bundle sold without being inspected. The court held, that the statute had authorized the sale of hay without inspection, and the Corporation had no right to repeal or supersede it. The seller was only required to prepare it for market, in the manner directed in the act, under the penalties therein specified. Although the ordinance in this case was dated after the statute, the reasoning of the court would as fully apply to one passed before. In fact, there had been a similar ordinance before the statute. This was but a revised publication of it.

Closely connected with this subject is the case of The

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People *vs.* Morris (13 Wendell, 325). The charter of the village of Ogdensburgh authorized the trustees of the village to grant licenses for keeping a grocery, to sell liquors therein, &c. This charter was granted in 1824.

The defendant had taken out such a license. The statute of 1830 (1 R. S., 677) provided a system of license for every town in the State; creating the supervisors and justices of the peace, commissioners of excise, with the power to grant licenses to keepers of inns and taverns and to grocers to sell liquors, but not to be drunk in their houses. By the 27th section, *the provisions* were not to extend to the *city of New York*, nor shall they impair the power of any corporation of any other city or town, or of the trustees of any village specially authorized by law, to grant licenses to sell liquors; but such powers shall be executed *in the manner herein prescribed by such corporation or officers authorized by it*, instead of the Board of Commissioners of Excise herein created.

It was held that the power granted by the village charter was wholly political. "Political power, conferred by the Legislature, is a public trust, to be executed, not for the benefit or at the will of the trustee, but for the common good; how long it shall exist, or in what manner it shall be modified, are questions independent of these depositories, and belong exclusively to the people to determine in the mode prescribed by the constitution."

It was held that the act of the Legislature superseded the village charter so far as to abolish the clause of the licenses which empowered a grocer to sell liquor to be drunk in his house; although the trustees continued to be the officers to grant the licenses.

See also Harrington *vs.* Trustees of Rochester (10 Wendell, 541).

An instance of an act of the Legislature, operating con-

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currently with the powers conferred in the charter, is to be found in the case of Furman *vs.* Knapp (19 John. Rep., 248, 1821). By a law of the State to regulate inns and taverns (1 R. S., 1813, 176), licenses to sell spirituous liquors by retail were to be granted by a Commissioner of Excise, appointed for the city of New York by the Governor, with various regulations respecting the license, and a penalty for selling by retail without it. The Commissioner might ask not less than five dollars, nor over fifty dollars for such license.

By the charter of New York, the Mayor has the exclusive power to grant licenses, under the seal of the city, for the sale of liquors, and may ask thirty shillings for each license. A similar statute to that of 1813 had been enacted in 1788. The Chief Justice says: "There can be no doubt that, from 1788 to the present period, both the Mayor and Commissioner have granted these licenses; the first under the charter, and the latter under the statute. After such a lapse of time, we are bound to presume that the Corporation of New York gave their assent to the act. It is not therefore necessary to consider how far the Legislature, without the consent of the Corporation, might modify and change the charter.

"If the charter of New York was not altered by the statute, as I think it was not, and if the statute also provided for the granting of excise licenses by the Commissioner, as I clearly think it did, then it follows that there was a concurrent jurisdiction, and that a license from both the Mayor and Commissioner was necessary."

This decision probably led to the statute of 1824, ch. 215, by which the Mayor of New York and the Aldermen and Assistants were constituted commissioners of excise, to license the selling of liquors, &c.

This act was afterward, in 1825, amended by giving the

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power to the Mayor, and Aldermen and Assistants of the several wards for such wards; and in the provision of 1830, the city of New York was excepted from the operation of the general statute (1 R. S., 681). Thus the power given by the charter has in fact been substantially reinstated.

The case of Contes *vs.* The Mayor, &c., of New York (7 Cowen, 585) is not only of moment upon the question which it decided, but for some general language of the court. "It was conceded," says the opinion, "by the counsel for the defendant in error, that the power of the Corporation to pass the ordinance in question must rest upon the statute of 1813 (2 R. S., 445, § 267), which for this purpose supersedes the original charter of the city.

This statute provides, that the defendants should have power to make by-laws and ordinances for the filling up, draining and regulating any ground, yards, or cellars, that may be sunken, damp or unwholesome; to fill up, alter and amend, all drains, sinks and privies, *and for regulating*, and, if they find it necessary, for preventing the interment of the dead within the said city. (Laws to reduce, &c., § 277.)

None of the powers enumerated in this statute were expressly conferred by any clause of the charter. The general authority given in the 14th section, to make ordinances for the public good, common profit, trade and government and rule of the city, would probably have supported the ordinance in question.

But otherwise the statute is the exclusive source of the whole authority in the subject matter.

Admitting, as I apprehend it must be, that the Corporation had the power to have passed the ordinance without the statute, then the latter did not supersede the charter, but was explanatory and declarative merely.

The cases which arose out of the act, appointing asso-

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ciate judges in the Court of Sessions, are also very important. Judge Lynch was appointed an associate judge of the Court of Sessions, under an act passed the 1st of May, 1840.

The Supervisors refused to pay his salary, and the grounds of defense were:

1. That the act did not receive the assent of two thirds of the members of the Legislature.

2. That the Mayor, Aldermen, and Commonalty remonstrated against its passage, and that it was passed without their assent.

The great question was, whether it was a corporate power secured by charter, and which the Legislature could not interfere with, unless by a two-third vote. But that they could so interfere with such vote, is admitted expressly by Justice Bronson, and was not disputed by any one in either court, unless in the expressions of Senator Hand. Chief Justice Nelson held that the constitution did not apply to public corporations, such as cities or villages, and therefore a majority vote was sufficient, and the law of 1840 constitutional. The opinion of Justice Cowen, that the act did not affect a charter power, seems to be unanswerably refuted by Justice Bronson.

The People, *ex rel.* Lynch, *vs.* The Mayor, &c. (25 Wendell; *Ex parte* Lynch, 2 Hill, 44); People *vs.* Purdy (2 Hill, 31); The People *vs.* Morris (3 Denio, 376).

Upon this power of the Legislature over corporate franchises, and the force of the provision of the constitution of the United States, the case of The Regents of the University of Maryland *vs.* Williams (9 Gill and Johnson, 365) is very important.

By an act of 1798, certain persons were incorporated under the name and title of the Medical and Chirurgical Faculty of the State of Maryland, with authority to elect a

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Medical Board, whose duty it should be to grant licenses to practitioners in medicine, upon the payment of a sum of not less than ten dollars. A penalty was fixed upon all persons so practicing without such license.

By an act of 1807, there was established, in the city of Baltimore, a college called "The College of Medicine of Maryland." And the members of the Medical Board, with the President and Professors of the College of Medicine, were constituted a corporation, by the name of The Regents of the College of Maryland, "with power to grant diplomas, and admitting students to practice surgery and medicine."

In 1812 an act was passed for founding a university in the city or precincts of Baltimore, and the members of the four faculties recognized and united thereby with the Provost of the University were constituted a corporation, by the name of the Regents of the University of Maryland, with various powers; among them a power to authorize the practice of surgery and physic.

It was held that the act of 1798, conferring the right to grant licenses, upon the payment of the fee, bestowed no vested inviolable right upon the medical and chirurgical faculty. These provisions were introduced, not for the promotion or regulation of private purposes or interests, but for a public purpose—the attainment of a public end—the prevention of mischief by the unskillful or ignorant. The allowance to the faculty of fees, for licenses, was merely an incident to a public regulation. The Legislature possessed the power to regulate the internal police of the State; a political power imparted to that department of the government, of which it is difficult to say it can entirely disrobe itself. It has the power to pass penal and sanatory laws, and to revoke them at pleasure, as circumstance and experience may require and teach.

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Again, it was held that the University of Maryland was a private corporation. The uses or objects might, in a certain sense, be termed public, but the Corporation, as distinguished from the uses and objects, was private.

Other cases of legislative control.

There are several instances of legislative interference with powers given by the charters, which, though not judicially determined, deserve consideration.

Selection of a Mayor.

By the charter of 1730, the Mayor was to be appointed by the Governor, with the advice of the Council. The constitution of 1777 vested the appointment in the Governor and Council of Appointment, so to continue until otherwise directed by the Legislature.

By the constitution of 1821, the Mayor was to be appointed annually by the Common Council. (Art 4, § 10.) But on the 3d of March, 1834, a statute was passed, directing that he should be chosen by the electors of the city, qualified to vote for charter officers.

This act was passed upon the formal application of the Common Council, the law being adopted and approved on the 24th day of February, and in March, 1834, it was ordered to be published in the papers employed.

By the 2d section of the constitution of 1846, "all city, town and village officers, whose election or appointment is not provided for thereby, shall be elected by the electors of such cities, towns or villages, or of some division thereof, or appointed by such authorities thereof, as the Legisture shall designate for that purpose."

By the 2d section of the amended charter of 1849, the election for charter officers shall be held on the day of the general charter elections, when all chartered officers, eligible by the people, shall be chosen. The Mayor shall hold his office for a period of two years.

Division of wards.

In another part of this work, I have stated the consecutive division of the city into wards, from the year

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1683. It is only necessary here to notice, that when the act of March 8, 1803, was before the Council of Revision, it was objected to, because the alteration could not be made without the assent of the Corporation. The objection was overruled, and the bill passed, becoming a precedent for future alterations.*

Courts of Justice.

The 27th section of Montgomerie's charter authorized the Mayor, or his deputy, or the Recorder, together with any three or more Aldermen, to hold a Court of Record for the trial of civil causes, real, personal and mixed, arising within the city, and with all the powers requisite thereto.

Chancellor Kent observes, "that this provision has become wholly superseded by affirmative, cumulative and new statute regulations, changing, in a considerable degree, the organization and character of the court."†

He details these minutely. It is not necessary to notice them, or those subsequentiy passed.

Qualification of electors.

Another and important case, in which the Legislature has interfered with and altered the regulations of the charter, relates to the qualifications of electors for members of the Common Council. By the charter, the Aldermen, Assistants, &c., were to be chosen by the freemen of the city, being inhabitants, and by the freeholders of each ward respectively from among themselves.

The act of March 21, 1800, chap. 35, provided, "that the freehold elector should have been one for a month next preceding the election, and that the freeman must have been admitted as such at least three months previously, and to have actually resided within the ward one month before the day of election."

By an act of April 5, 1804, ch. 62, the qualifications of electors, instead of being confined to freeholders and freemen, were enlarged so as to include every male citizen,

* Notes and Illustrations, ed. 851, p. 215. † Ibid., Note 41.

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of twenty-one years and upwards, who should have resided in the city for the space of three months previous to the election, possessed of a tenement of the yearly value of twenty-five dollars, and have paid taxes.

Chancellor Kent states (Notes and Illustrations, note 25), that "this act was passed without the approbation or consent of the Common Council, and that it was objected to in the Council of Revision, but was passed notwithstanding.

"The objection was drawn by the elder Governor Clinton, and supported by him and a majority of the Council, on the ground that no strong policy or necessity indicated the measure, and that it had been considered a settled and sal utary principle in the government, that charters of incorporation, containing grants and privileges, were not to be essentially affected without the consent of the parties, or without due process of law. In confirmation of this, many previous statutes were referred to, passed since the Revotion, relative to the Corporations of New York, Albany and Hudson, in which alterations in their charters had been made upon the application of the corporations, or with a saving of rights held under their charters."

Certainly this was a strong case of legislative interference.

The qualifications of electors are now regulated by the 2d article of the constitution of 1846, and the amended charter of 1849 provides that the laws of the State, regulating elections, shall apply to the election of charter officers (§ 2); but the Common Council may, by law, extend the time for the canvass of the votes.

Time of Election.

By the tenth section of the charter, the time of the election of Aldermen, &c., was to be on the Feast of St. Michael (29th of September). By the act of March 21, 1800, this was changed, on the petition of the Corporation,

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to the third Tuesday in November, and the amended charter of 1830 fixed it for the second Tuesday of April, annually. By the 2d section of the charter of 1849, the election for charter officers is to be held on the day of the general state election—Tuesday succeeding the first Monday of November.

Licenses for Taverns, &c.

The charter of 1686 gave the power of granting licenses, for the keeping of taverns and sale of liquors, to the Mayor exclusively (§ 10). The fees were to be applied to the use of the Corporation. The 26th section of Montgomerie's charter renewed these provisions. The colonial act of 1713 (ch. 263) authorized and required the Mayor and Aldermen of the city to farm out yearly at auction, to the highest bidder, the excise on strong liquors. By the act of March 1, 1788, a Commissioner of Excise was to be appointed for New York, and the Mayor was made *ex officio* such commissioner. By one of the sections, the Mayor was to account to the Chamberlain of the city for the residue of the fees (after certain specified deductions), to be applied in part to the use of the City Hospital, and the remainder toward the contingent expenses of the city, under the direction of the Common Council. The act of 1801 (ch. 164) continued this part of the law, but enabled the Council of Appointment to appoint such person as they thought proper to be the Commissioner.

The act of April 10, 1824 (p. 215), was passed on the application of the Corporation, and the Mayor, Aldermen, and Assistants, were declared to be the Commissioners of Excise, and the fees were to be applied toward the support of the city poor. An amendment was made by the act of April 16, 1825, ch. 196, declaring more precisely, that the Mayor, with the Aldermen and Assistant of each ward, should be such commissioners for the particular ward.

These details are taken chiefly from Chancellor Kent's Notes and Illustrations, p. 160, note 22.

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The Revised Statutes of 1830, prescribing a general law for the regulation of the excise, except specially the city of New York, and the act of 1845 (ch. 500) contains a similar exception.

The law now in force appears to be that found in the statutes of 1824 and 1825. They have brought back the system nearly to that of the charter. The clause appropriating the fees, as provided in the act of 1788, is abrogated; and the only difference is, that the Aldermen and Assistants participate in the appointment.

Alterations by consent.

But where the Legislature cannot by its own power abrogate or vary a charter privilege, it may yet do so with the concurrence of the Corporation. There are certain principles of law upon this subject to be noticed.

A subsequent charter given by the crown operates upon a previous charter to the same body as a confirmation, an enlargement, or a restriction. This is the language of the common law. But, to have the last effect, it must be accepted; and Lord Mansfield and Justice Wilmot declared, that an acceptance in part, proven by acting under it in a particular case, does not prove acceptance of the whole so as to supersede entirely the former charter.*

The king can neither repeal nor modify a charter, nor direct any new mode by which the powers conferred in it shall be exercised.† Acceptance of a new charter from him, and action under it, is, therefore, proof of a new compact, and goes no further than the acceptance goes.

Judge Spencer, in the case of The Mayor *vs.* Ordinaux (12 John. Rep., 125), observes, "that it might be assumed the act then in question was passed upon the application of the Common Council, though not so stated in the recital, for it was almost the invariable custom of the Legislature not to interfere by a statute, unless applied to. The

* Rex *vs.* Cambridge, 3 Burrows, 1656. † Ibid.

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acquiescence, therefore, of the Corporation was to be presumed, and, if their rights under the charter were infringed upon, it was with their own consent."

With all the respect due to the opinion of one whose judgments have become aphorisms of our law, I may be allowed to dissent from this doctrine. It is usual for the preamble of an act to state the fact, when it has been passed on the application of the Common Council. Where this is not the case, it imposes too much upon that body to be compelled to prove its opposition or dissent. The question then is simply one of an express assent by a formal acceptance, or a plain implication of assent from action under the new statute. But if there is no recital of an application, no proof of an express assent, and no action from which to infer it, I cannot perceive how a renunciation of rights is to be deduced from the passage of a statute, possibly without their privity, and which might be in opposition to their will. The other point relied upon in the decision referred to, viz.: an acquiescence since 1788, and a concurrent action, presents a different ground, and a stronger one, for the determination.

Upon the subject of an acceptance, by a corporation, of a new charter, the case of the Regents of the University of Maryland *vs.* Williams (9 Gill & John., 365) contains the following propositions:

It is not necessary to the constitutionality of an act altering a charter, to the passage of which a previous assent has not been given, that it should by its terms be made to depend upon a subsequent assent.

The passage of such an act, with nothing more, amounts only to an offer for acceptance; and if afterward accepted, either expressly, or by acting under it, it receives life, and becomes an operative law.

But the acts, from which the assent of a corporation to

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an alteration of its charter may be inferred, must be corporate acts, or acts of its authorized agents or officers. The acts or declarations of particular members cannot bind.

See also, Planters' Bank *vs.* The Banks of Alexandria (10 Gill & John., 346).

But the next and very important question is, who are the parties competent to give such assent, and especially is the Common Council at present empowered to do so.

This subject was discussed, and gave rise to a protest of several members of the Common Council, in July, 1851, under the following circumstances.

By an act of May 7, 1844, for the establishment and regulation of the Police of the city of New York, it was provided that the Chief of Police should be nominated by the Mayor to the Common Council, and, with their approval, shall be appointed by the Mayor. (Art. 111, § 1.)

The 2d article, § 1, of the act amending the former act, passed the 13th of May, 1846, contained the same provision; and in both acts it was provided that all vacancies in the office of Chief of Police shall be filled in the same manner.

The duration of the office was for one year. Mr. Matsell having been appointed Chief of Police, his term expired, or was to expire, and no new nomination being made, he held over by virtue of the 9th section of the 5th chapter, part 1, of the Revised Statutes. (1 R. S., 121.)

The act of July 11, 1851, then provided, that in case the Mayor should refuse or neglect to nominate the chief officer of a bureau in the Police Department, designated as the Chief of Police, for five days after the commencement of the session of the Common Council, to be holden in August, 1851, it shall be the duty of the Board of Aldermen to appoint such officer forthwith. And in case the

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Mayor shall make such nomination, and it shall be rejected by the Board of Aldermen, the Board of Aldermen shall have power, at any regular session of the Common Council, to appoint such officer, provided that five days of any such session shall elapse without another nomination being made by the Mayor; and that no appointment of such officer shall have been made as heretofore provided.

The Mayor having nominated Mr. Matsell, the then incumbent, to the office, an effort was made to reject the nomination, with a view, doubtless, to let in the operation of the other clause of the statute, devolving the power upon the Board of Aldermen. It is sufficient to observe that, after the chair had declared the nomination rejected, upon an appeal this decision was reversed. The matter was then dropped. .

In the course of these proceedings, majority and minority reports were submitted. In the former, the ground was taken that the office was vacant—a ground certainly not tenable, for every act of the Chief of Police was as valid as if his term had not expired. In the latter, the position was urged that the statute of 1851 was void, because it annulled a portion of the charter without the assent of the people of the city. The distinction between the franchises granted by a charter and the political rights and privileges is treated as without foundation.*

The question, it will be perceived, is two-fold. First, is the act of the Legislature valid without any assent from any body or persons; and *next*, if not so, is the assent of the citizens requisite, or is that of the Common Council sufficient. It is impossible, without overthrowing a long

* A sensible article in the Commercial Advertiser, of August 7, 1851, also supports the proposition, that, since the charter of 1849, no change, of any description, can be made without obtaining the assent of all the citizens entitled to vote—that the compact was with them.

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train of decisions, to sustain the proposition that this mere branch of political power, the regulation of the police of a city, is not within the scope of legislative control. The only possible question is, whether the Legislature, by submitting the amendments to the people at large, in 1849, curtailed or renounced this authority.

It was before observed that these and every amendment of a charter must spring from the legislative power. The inhabitants of New York and the Common Council together could no more alter a charter than they could create themselves a body politic.

The Legislature in 1849, as in 1830, did no more than to submit the proposed changes to the ratification of the constituency at large, instead of taking the consent of the Representative Body. Treat it, as it may well be treated, as a new charter then bestowed, it must be regarded as a grant conferred, subject to the settled and fundamental authority of the Legislature to act upon subjects for the general benefit of the State, unless they have relinquished such power in express terms. It is a compact, indeed; but it is a compact that every franchise, which by the settled doctrines of the law is beyond legislative interference, shall be absolutely enjoyed; and that such privileges as by the same settled rules may be recalled, or abridged, shall remain subject to legislative control. Besides, the case is within those authorities which declare that no law or statute shall be treated as restricting or surrendering a general legislative power, held as a trust for purposes of general good, at least without the most positive language. "It was ruled in The Charles River Bridge *vs.* The Warren Bridge (11 Peters, 420), that the State is not presumed to have surrendered a public franchise, in the absence of proof of an unequivocal intention to do so."*

* 9 Watts and Serg., 1.

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And it is a striking fact, that the compact under the amendments of 1830 and 1849 is less distinctly and stringently made with the inhabitants of the city at large, than in the charters of Nicolls, Dongan, or Montgomerie.

By the former, "the inhabitants of New York, New Harlem, and all others, his Majesty's subjects, inhabitants upon the island called Manhattan Island, are and shall be established as one body politique and corporate."

The charter of Dongan recited that "the city of New York had been an ancient city, and the citizens thereof had anciently been a body corporate and politic." The 6th section indeed constituted and declared the Mayor, Recorder, Aldermen and Assistants, one body politic and corporate, in deed, fact and name, by the name of the Mayor, Aldermen, and Commonalty of the city of New York.

The preamble to the charter of Montgomerie declares, "We have thought fit, them, the said inhabitants and citizens of the said city of New York (by whatsoever name or names they have been or were incorporated, or whether they have been or were incorporated or not, into one body politic and corporate, by the name of the Mayor, Aldermen, and Commonalty of the city of New York, by our letters, to make, constitute, confirm, renew, and of new to create."

And, by the first section, it was "willed, ordained and granted, that the Mayor, Aldermen, and Commonalty of the said city and their successors, from henceforth forever, shall be and remain one body corporate and politic in *re facto et nomine*, by the name of the Mayor, Aldermen, and Commonalty of the city of New York."

Now, a proposition which would in effect render the assent of the inhabitants necessary to the changes in a charter, would abrogate hundreds of laws passed from 1686 to the present time, or make them depend for validity

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upon the vague, undefinable, perilous ground of a presumption of assent.

It is very true there is a series of authorities,* involving the doctrine that, in general, the assent of the whole body of corporators is necessary to any radical change in a charter, except where the power to accept is delegated to a selected body. But in the first place, the principle is applied in these cases to private corporations. And in the next place and principally, in such instances, the Board (Trustees or Directors) is a distinct, separate body, created with defined powers, strictly to be construed. Here the Mayor, Aldermen, and Commonalty are the Corporation, and all are assembled in Common Council by representation, as if all were in person present.

The case of Ward *vs.* The Society of Attorneys (1 Colyer, Ch. Rep., 370) is instructive upon the general rule. An association of attorneys had been formed for the purpose of facilitating the acquisition of legal knowledge, &c. They had raised a fund by contribution, and purchased a piece of land and erected buildings thereon, and then obtained a charter of incorporation from the crown, with power to acquire and alienate real estate.

A very large majority of the subscribers proposed to take measures which would surrender the charter, and alien the property, for the purpose of destroying the Corporation. A small number of the subscribers interfered and sought an injunction.

The Vice Chancellor said: "The law allows a corporation having perpetual succession to be constituted; the law allows individuals to acquire a beneficial interest in

* A very full case, on this subject, is that of The Commonwealth *vs.* Claghune (1 Harr. Penn. Rep., 133). The proposition sustained in the case is, that the selected body must be specially authorized to that effect, in order to bind the whole body of corporators by their assent. See also Angell and Ames, on Corporations, 53.

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the preservation of such a body so lawfully constituted. And if these things be so, I am not aware of any principle, of law or equity, which can enable that lawfully constituted interest, thus obtained, to be taken away, without the consent of every person interested, unless by means of a condition to which the original creation was subject."

In the case of a public power granted to a municipal corporation, a condition is attached by the law itself to the original grant, that it may be varied.

An important proposition, connected with this subject, was submitted by the Law Committee of the Board of Aldermen, in January, 1851. On the 21st of that month, they reported the following :

" *Whereas*, The charter of this city, adopted in 1830, as amendatory of the Royal charter, as well as the charter of 1849, were both adopted by a vote of the people ; and

" *Whereas*, Any amendment to the charter, made by an act of the Legislature, without the formal concurrence of the people, might work a forfeiture of all the chartered rights and franchises of the city ; therefore,

" *Resolved*, That in any amendment, for which application shall be made under a resolution of the Common Council, provision shall be made for submitting the same to the people for their approval."

This resolution passed the Board of Aldermen almost unanimously. It was referred, in the Board of Assistants, to the Law Committee (January 24, 1851), who reported against it, which report was adopted (January 30, 1851).

The Board of Aldermen passed a resolution of adherence, which came before the Board of Assistants, on the 10th of May, 1851, and was referred to the Committee on Finance. The resolution had been accompanied with one respecting the mode of making city loans. And here it ended.

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It may be remarked upon this proposition, that as far as the Legislature is concerned, it of course could not prevent that body from passing a law which it was competent to pass at all, without the provision. If the Legislature adopted it in a particular act, it would be a restriction of its own power with its own consent. But it would by no means follow that the Legislature would thus deprive itself of the power to repeal that law, and adopt a new one, without such consent. The proposition that such shall not be a law unless agreed to, or that it shall be a law if agreed to, does not involve the conclusion that it shall forever remain the law unless the repeal is assented to. It will be remembered that I am speaking of those public powers and franchises which are within the admitted authority of the Legislature to change.

Where legislative aid is necessary

Having thus endeavored to show the cases in which the Legislature has interfered with the powers of the Corporation under the charters, and pointed out some of the principles which govern that right of interference, the next subject of importance is, in what cases has the Corporation necessarily resorted to the Legislature for aid, and when must it so resort, from the inadequacy of its own powers, conferred or implied.

It will readily be seen, that there is a marked distinction between that class of rights, powers, and franchises, which have been conferred exclusively by acts of the Legislature, and those which are to be found entirely or substantially in the charters.

There is also another distinction between the modes of exercising powers bestowed in the charters, the remedies which are expressly given or necessarily attach themselves

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to the grant, and those modes and remedies which are not bestowed, nor necessarily spring from such grants, but are only possessed through an express authorization of the Legislature.

In general, it may be observed, that where rights or powers have been newly conferred since the charters, the mode of enjoyment and exercise prescribed by the act conferring them must be strictly pursued. If no mode is pointed out, then the course must be such as is consistent with the acknowledged principles of law, and necessary to give effect to the power or franchise.

The right to establish the Croton Aqueduct, and to take property for that purpose, is a striking example of this class of cases. New property and privileges are newly conferred, and whatever the Legislature has prescribed must be implicitly pursued. Both right and remedy find their source, their extent, and restrictions, in the statute.

Again, where the remedy for executing a power given in the charter is new, and arises solely from an act of legislative power, the remedy must be resorted to exactly in the mode the statute directs. Any substantial deviation would be unlawful. No ordinance could vary it. Yet an ordinance upon the subject matter could be passed, not inconsistent with any express provision, but more fully to carry out the plain intent.

For some purposes, legislative aid has always been requisite.

1. The power to lay a public tax, either for general or specific purposes, did not vest in the Corporation under the charters; it probably could not be conferred by the crown alone, being the highest exercise of sovereign authority, but only by Parliament or the State.

2. The power to take private property for public use is of the same character, and would not have vested in the

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Corporation, even if the provision in the charter of Montgomerie, that no land should be taken but by consent, or under some known law of the province, had been omitted. Hence the statute of 1691 gave the authority to the Corporation, to be exercised through the intervention of a jury.

3. Again, even if the Corporation did, under the charter, possess the power of doing any work themselves, and charging it upon the party bound by law to do it; yet clearly they could not make such expenditure a lien upon the property in relation to which the burthen was imposed, or sell the same to defray it.

4. It may be doubted whether the Corporation possessed the power, under the charters, of assessing particular persons, or any class of persons, for a special benefit, conferred upon them by a public improvement, independently of the benefit they derive in common with others. There are traces of this principle being acted upon under the Dutch government; but when the charters are necessarily looked to as the sources of power, I do not find this right either expressly conferred, or clearly implied, as requisite to carry out admitted powers. The decision in The People *vs.* The Mayor of Brooklyn settled the question of the legality of acts of the Legislature for such an object, but went no further.*

5. The Corporation can have no legal remedy for enforcing its ordinances, but such are bestowed in the charters, without legislative assistance. The remedies given (§ 14) were, a distress and sale of goods for the recovery of the fines and amercements for violation of an ordinance, or an action of debt in any court of record; or *in any other lawful method to be obtained.*

The process by distress and sale was superseded by ordi-

* 4 Comstock, 419.

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nances of the Corporation, especially that of 1834, c. 48. The clause italicised refers to methods subsequently to be sanctioned.

The legislation and ordinances respecting swine show this principle distinctly. The ordinances of 1683, 1692 and 1719, were perfectly legal, and did everything which the statute of Oct. 17, 1730, effected, except the additional remedy of impounding and selling stray swine; a provision which was continued in the act of February 27, 1823.

Subject to such exceptions, and those of a similar nature, it is surprising how comprehensive and how adequate were the powers and remedies given in the charters for almost every purpose of municipal government. Yet at the present time it would be altogether unsafe and erroneous to resort to the charters solely, upon any question of power, or its mode of exercise. For this most important and fundamental maxim must be borne in mind, that every act of the Legislature, passed on the application of the Common Council, or recognized after its passage, expressly, or by action under it showing acquiescence, becomes a change of, or addition to, the charter. And the acts of the Legislature have become so numerous as scarcely to leave a single subject of power or right untouched.

Hence, for the solution of every question of power, and its mode of exercise, or the validity of any ordinance or act, the practical and necessary course will be: *First*, to examine the charters for any provision upon it; *next*, to trace the acts of the Legislature, and, of course, any judicial exposition. If any statute supplies a rule of decision, the next question is, has it been adopted by the Corporation. If so, the inquiry is at an end. If not, then the point arises, whether the statute is one which could be passed even without the assent of the Corporation. If this is the

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case, here also investigation terminates. But if it is not the case, then we come back to the charter, to settle the existence and extent of the power, and how it may be carried into effect. And, of course, this last must be the mode, when a provision is found in the charter, and no act of the Legislature whatever has been passed upon it.

Eminent domain.

It was before observed that the Legislature had no power to interfere with the rights to, and enjoyment of, the property of the Corporation, except where the doctrine of sovereignty, or, as it is termed, eminent domain, is brought into exercise. This subject requires some further consideration.

It cannot, I think, be questioned, that in this particular the Corporation is precisely in the same situation as an individual. Its property is as absolutely and sacredly guarded by the Constitution and the law. No distinction is known or can be sustained, unless there is some exception derived from the law of its creation, or the particular acquisition.

I consider that this principle is as applicable to property, the legal title to which is in the Corporation upon defined trusts, as where they are beneficiaries as well as vested with the legal estate. I have not found a satisfactory reason for making a distinction between the Corporation as trustees for the inhabitants or other classes, and of an individual trustee for other individuals. In truth, the Corporation may, in almost every sense, be regarded as trustees. All the property they hold, whether the legal title is accompanied with an expressed trust, or not, is held for the benefit of others.

In the case of Heyward *vs.* The Mayor of New York (3 Selden, 214), the subject of the right to take private property, for public purposes, was carefully examined. Mr. Justice Welles, in delivering the opinion of the Court, says: "The right to take private property for public pur-

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poses does not depend upon any express provision in the charter of government, but is an inherent attribute of sovereignty existing in every independent State. Private interests must yield to public necessities. This is what is meant by the right of eminent domain. Its existence with us has never depended upon written constitutions; although, by those of 1821 and 1846, its exercise is declared to be limited, upon the condition of making just compensation; (Constitution, 1821, art. vii., § 7; do., of 1846, art. i., § 6). The Constitution of 1777 contained no similar provision, yet I apprehend no one, from the foundation of the government, ever doubted the existence of the right, from the silence of the Constitution on the subject."

"This right of eminent domain implies the right to determine the time and occasion, and as to what particular property it may be exercised. This is of the nature and essence of the right. The same power determines the estate or quantity of interest in the lands which shall be taken; whether an estate for years, for life, or in fee; whether a right of reversion shall in any event be left in the owner, or whether a mere easement shall be taken, without devesting the fee or general ownership in the land. A case might arise where a temporary use would be all that the public interest required. Another case might require the permanent and apparently perpetual occupation and enjoyment of the property by the public; the right to take it must be coextensive with the necessity of the case, and the measure of compensation should be graduated by the nature and duration of the estate or interest of which the owner is deprived. Here a fee simple was deemed necessary and was taken. The compensation must have included the whole value of the inheritance."

The lands were taken for the purpose of extending the Alms-house establishment. In 1844, the Corporation

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resolved to remove the Alms-house to Randall's Island, and proceeded to sell the lands, acquired by the proceedings, taken under the statutes of 1818 and 1816, referred to in the case. Those statutes provided for the mode of compensation, and vested the lands in the Corporation in fee simple absolute. The decision was, that there was no reverter to the original owners, when the lands were sold and the proceeds applied to other purposes. The Corporation possessed the power to sell.

The signal importance of this decision has induced me to state it at length.

In The People *vs.* Smith (21 N. Y. Rep., 595), the Court held, that the question of the necessity or propriety of appropriating private property to public use is not a judicial question. "The power resides in the Legislature. It may be exercised by means of a statute, which shall at once designate the property to be taken and the purpose of the appropriation; or it may be delegated to public officers; or, as has been repeatedly held, to private corporations, established to carry on enterprises in which the public are interested. There is no restraint upon the power, except that compensation is to be made. In imposing a tax, or in appropriating the property of a citizen, or a class of citizens, for a public purpose, with a proper provision for compensation, the legislative act is itself due process of law; though it would not be if it should undertake to appropriate the property of one citizen to the use of another, or to confiscate the property of one person, or a class of persons, or a particular description of property, upon some view of public policy, where it could not be said to be taken for a public use. (The People *vs.* The Mayor of Brooklyn, 4 Comstock, 419; Taylor *vs.* Porter, 4 Hill, 140; Wynchamer *vs.* The People, 3 Kernan, 378.)"

It was held, in this case, that under the statute providing for the opening of a highway on Long Island, it

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was not essential to its validity, that it should provide for notice of the proceeding to be given to the owners of the land affected. The learned Judge says, that he does not speak of the process for arriving at the amount of compensation to be paid to the owners.

The Constitution of 1846 (art. 1, § 7) provides, that when private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by not less than three Commissioners, appointed by a court of record, as shall be prescribed by law.

The case of Britton *vs.* The Mayor of New York, decided in 1843, was referred to in the former edition, from a manuscript copy of the opinion. It has since been published in 21 Howard's Pr. Rep., 251. The action was, to recover compensation under a contract for cleaning the streets. The Court, Nelson, Ch. J., say: "These grants," (ferries, waste and land under water, &c.) "and many others that might be enumerated, constitute a large mass of private rights and interests, in various descriptions of property, real and personal, corporeal and incorporeal, held and enjoyed by the city in the same way, and in common with any citizen, upon whom like property and franchises might have been conferred; and, within the limit of the grant, the defendants may deal with the property, in their management and disposition of the same, in any way that would be lawful for an individual owner; and any contracts or engagements, entered into in the course of such management and disposition, would be as obligatory upon them as upon an individual.

"The rights and privileges thus granted are altogether distinct and different from those with which the defendants are invested under the charter as a municipal body. The latter class comprises a large body of political powers, granted solely for public objects and purposes, with which

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the private interests and estates of the defendants, strictly speaking, have no concern. These powers are conferred for the benefit of the city as a community, and the end sought to be attained, its good government.

"On looking into the charter, it will be found to embrace an extensive grant of political power, legislative, executive, and judicial, which, so far as granted, represent these great departments of the State Government, and which are lodged with the defendants in their capacity as a municipal corporation."

The point decided in the case was, that it was not in the power of the Common Council to bind its legislative capacity by any private arrangements or stipulations, so as to disable itself from enacting any law that might be deemed essential for the public good.

Some other decisions and other considerations, as to the powers of the Corporation, when they act in their legislative capacity, and when as owners, and their rights as such, will be found under the head of "Streets," and in some other particular parts of this treatise.

Mode of proving.

By the 2d section of act of April 17, 1832, the charter of the city of New York may be read in evidence from the volume containing such charter, printed by authority of the Common Council, or from a copy certified by the clerk of the Common Council.

In Howell *vs.* Ruggles (1 Selden, 444), it was held, that the Legislature meant to allow the charter to be read from any volume printed by authority of the Common Council. The charter, as printed in Kent's charter in 1836, certified by the clerk to have been printed by authority of the Common Council, was read in evidence. It may be read for all and every purpose.

By the 3d section of such act of 1832, a copy of the proceedings of either chamber, testified by the clerk, may be read in evidence in all courts.

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CHAPTER II.

SECTION I.

TERRITORIAL EXTENT AND JURISDICTION.

Before 1647, the city had acquired the name of New Amsterdam. It is so called in the proclamation of Governor Stuyvesant, cited in note 1.

In the new charter, granted by Nicolls, upon the reconquest in 1665, "the inhabitants upon the island, known as Manhattan Island," were incorporated. The city was thus defined by the island.

In October, 1683, by a resolution of the Mayor and Aldermen, the city was divided into six wards, called the South Ward, the Dock Ward, the East Ward, the North Ward, the West Ward, and the Out Ward; and the description and boundaries of these wards are stated in the note.*

By the 4th section of the charter of Dongan (22d of April, 1686), it was provided, "that the said city of New York, and the compass, precincts and limits thereof, and the jurisdiction of the same, should extend and reach itself, as well in length as in breadth and in circuit, to the furthest extent of, in and throughout all the said island Manhattans, and in and upon all the rivers, rivulets, coves, creeks, waters, and water-courses, belonging to the said island, as far as low water mark."

The *county* of New York had been erected by an act of the first Assembly, held within the province, passed the 1st of November, 1683, and was described as stated in the note.†

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* Note No. 16. † Note No. 17.

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An act of the Colonial Assembly was passed on the 1st of October, 1691, for dividing the Province into counties; and by that the city and county of New York was to contain all the islands, commonly called Manhattan's Island, Manning's Island, the two Barn Islands, and the three Oyster Islands. Manhattan's Island to be called the city of New York, and the rest of the islands the county.

By the same act, "Kings county was to contain the several towns of Bushwick, Bedford, Brooklyn, Flatbush, New Utrecht, and Gravesend, with the several settlements and plantations adjacent."

Then by the charter of Montgomerie, in 1730, all previous grants were recognized and confirmed; and, in the second section, the extent of the city was defined by metes and bounds.*

An act of the Legislature, passed March 7, 1788, divided the State into sixteen counties, and the description of the county of New York will be found in the note, as well as that of the county of Kings.†

The description is precisely the same in the Revised Statutes of 1830, except that, in the latter, the line on the west is "the west bounds of the State," instead of "low water mark on the west side of the Hudson River, or so far as the bounds of the State extend," with some other variations which will appear in the note.‡

There was a statute enacted on the 24th of November, 1824, relating to the boundaries and jurisdiction of the counties of Kings, Richmond, and the city and county of New York, which in an historical account is to be noticed. It was repealed in the general repealing act of 1830, but one of its sections was re-enacted as follows: "The counties of Kings, Richmond, and New York shall, for

* Transcribed in Note 17. † Note No. 18.
‡ 3 R. S., Ed. 1848, p. 2. Note 18.

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the purpose of serving all process, civil and criminal, have concurrent jurisdiction on the waters in the counties of Kings and Richmond, lying south of the bounds of the county of New York." *

The jurisdiction of the city of New York is subordinate to that of the State; and no doubt territorial limits and authority may be changed by the Legislature. Accordingly we find that when the State ceded Bedlow's Island, Oyster Island, and the Governor's Island to the United States, they did so by an act of the Legislature, expressly transferring the jurisdiction, reserving the right to serve process merely. This was done without the assent of the city of New York. (Act of February, 1800, 1 R. S., 1813, p. 789.) But when the land at the foot of Hubert street was given for a fort, as it extended into the river, and comprised soil which belonged to the Corporation (part of the four hundred feet), commissioners were appointed to give the assent of the State to the cession to the United States. (Sess. Laws, 1807, 1 R. S., 191.) And from the minutes of the Common Council, in October and November, 1807, it appears, that deeds for the property were executed by the city, with a condition that, when no longer used for the purposes of fortification, it should revert.†

Between Brooklyn and New York.

More difficulty and controversy have existed in relation to the jurisdiction of New York and Brooklyn, than elsewhere. I have set forth in the notes all the statutes relating to the county of Kings, and to the city, which appear to bear upon the question. ‡

The subject has been before the Supreme Court in two cases (Udall *vs.* The Trustees of Brooklyn, and The Mayor of New York *vs.* Stryker, 19 John. Rep., 175 and 179). In the first case, an action was brought to recover a pen-

* 3 R. S., Ed. 1848, p. 18. † See Atlas No. 5, Street Commissioner's office.
‡ Notes 19 and 20.

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alty for a breach of an ordinance of the village of Brooklyn. The act complained of was, the measurement of grain in a store, on a wharf erected over twenty-five years before, the west end of which extended between ten and twenty feet west of low water mark; being made land.

The defendant below was authorized to measure grain within the limits of the city of New York, by license from the Corporation of that city.

The charter of New York and the statutes of 1801 and 1816, cited in the note, were relied upon.* The Court say: "This was an action for violating the by-law of the village of Brooklyn, in assuming to exercise the office of measurer of grain, without a license from the trustees. The defense was, that the act complained of was done in a store, on a wharf or dock, west of the natural low water mark of the East River, on the Nassau or Long Island shore, and not within the limits of Brooklyn. We are of opinion that *Kings county* includes all the wharves and made land on the Long Island shore of the East River, as well as natural alluvion to the actual line of low water."

In the other case the Corporation of New York sued Stryker for a breach of their ordinance, in measuring grain within the city and county, without being licensed. The act was done on a vessel, made fast to the west end of a dock, on the East River, on the Brooklyn shore, lying to the west of the usual low water mark. In this alone did there exist any distinction between the cases. The Court said: "The cause was distinguishable from the former case. The city and county of New York includes the whole of the rivers and harbor to actual low water mark on the opposite shores; and although permanent erections, such as wharves and store-houses, may from time to time vary the line of jurisdiction, yet it cannot be allowed that Brooklyn

* Note 20.

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is to be extended by means of a floating vessel in the river, although she may be fastened to the dock. The vessel in this case was in the city of New York, and the defendant was not licensed there to do the act complained of."

These cases were decided in 1821.

It is clear that a change of territorial jurisdiction might be made, without regard to the ownership of the land transferred to the new jurisdiction, and such a change would not and could not affect the right of property. In that respect the Corporation is like an individual owner, placed under a new jurisdiction.* So Mr. Wells in his argument observes, "that the property on which the wharf was built was no doubt derived from the city of New York; but the question was one merely of jurisdiction, which must vary with the change of low water mark, whether by natural or artificial means."

I do not find that the Court rely upon the effect of the act of 1801 or 1816, both cited in the note. †

The East River was in these statutes made the boundary. Upon the general rule of construing a grant, this would only be to high water mark as to the soil; but upon a question of jurisdiction it would be extended to low water. I should have supposed it meant low water, as it existed when the act was passed. The decisions, however, appear to establish that, for jurisdiction, the line of low water in the charter at Brooklyn was changeable at the will of the Corporation of Brooklyn, by erecting wharves; and that the line of the *East* River is equally liable to be extended in the same manner. I do not see any restriction to this power of fixing the line anew from time to time, unless it be in the provision of the Revised Statutes, that where two counties are separated from each other by a river or creek the middle of the channel of such river or creek shall be

* See Plymouth *vs.* Jackson, 2 Harris' Penn. Rep., 44. † Note No. 20.

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the division line between them, unless therein before otherwise provided.*

It is clear that there must be a correspondent right, in the city of New York, to extend its territorial jurisdiction in a similar manner, and there could be no dividing point but the centre of the river.

The right of each is, of course, subject to the obligation of not interfering with, or injuriously affecting, the navigation. Within certain points, however, viz., from Partition street to Jackson street ferry (near Hudson avenue), the exterior line of Brooklyn has been defined by commissioners appointed under the act of May 25, 1836; beyond which line wharves cannot be erected without the sanction of the Legislature. The statute, with the decisions referred to, settle, therefore, the territorial authority according to this exterior line; at any rate, when wharves are built up to it. This and similar acts are more particularly referred to in chapter 3, § 3, respecting the right of the Corporation to a strip between high and low water on the Brooklyn side.

New Jersey line.

In the year 1833, the boundary between New Jersey and New York was adjusted by commissioners, and their agreement was embodied in and ratified by an act of our Legislature, passed the 5th of February, 1834,† as also by an act of New Jersey; and it received the sanction of Congress. (Ch. 126, 1 Sess. 23d Congress.)

A long and troublesome controversy was thus settled. Some references, of an historical nature, connected with it will be found in the note.‡

Upon this adjustment it was early agreed (as I am informed by one of the distinguished commissioners),§ that any discussion of the abstract legal title of the two States

* 1 R. S., 78, § 3, Ed. 1846.
† Note No. 21.
‡ Note No. 22.
§ B. F. Butler, Esq.

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should be waived, and that the settlement should be made upon great principles of justice and expediency, with a particular regard to the position of New York, as a large and growing seat of commerce, and to the full efficacy of her quarantine regulations, and control of immigration.

The leading points of the agreement are these:

The middle of Hudson's river, from a point therein opposite the forty-first degree of latitude, as before settled—the middle of the bay of New York—of the waters between Staten Island and New Jersey, and of Raritan bay to the main sea, is established as the boundary line.

But, as exceptions to this boundary, the State of New York retains jurisdiction over Bedlow's Island, Ellis Island, and all other islands lying in such waters, then subject to its jurisdiction.

A qualified jurisdiction is also retained by New York in the waters of Hudson river, and the bay lying west of Manhattan Island, and south of Spuyten Devil Creek, and over the lands covered by such waters to low water mark on the New Jersey side. The qualifications are important.

New York was to have exclusive jurisdiction of and over the waters of Kill Van Kull, between Staten Island and New Jersey, to the westernmost end of Shooter's Island, in regard to quarantine laws and laws relating to passengers, then in force, or which might thereafter be passed by that State; and, for the like purposes, of and over the waters of the Sound, from the westernmost end of Shooter's Island to Woodbridge creek, as to all vessels bound to any port in the State of New York.

Exclusive jurisdiction was given to New Jersey over certain waters, but subject to very extensive powers and rights vested in New York. All these provisions will be found in the note,* where the statute is transcribed.

* Appendix, Note 21.

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SECTION II.

Division into Wards.

It was before stated that, in the year 1683, the city had been divided into wards by the authority of the Mayor and Aldermen, and the limits are stated in note No. 16. The 9th section of Dongan's charter refers to the wards as fixed. In Montgomerie's charter, a new division into seven wards was made. It is not deemed necessary to copy the boundaries, as the document is now so accessible. Hill's map, of 1782, shows the lines of the wards; and it is principally to be noticed, that the river wards extend to and comprise the four hundred feet below low water, which were granted in the charter of 1730.

A new division into wards took place in the year 1791, by a statute of the State (Sess. Laws, p. 349). It recited that some of the wards in the city are large and populous, and others are very small, and the bounds of some of them are difficult, if not impossible, to be ascertained, so that alterations therein are become necessary. The division is then made into seven wards. It is not thought necessary to transcribe the boundaries, but it is to be noticed that the limits of the river wards extended collectively to all the soil under water on the Long Island side, from the Wallabout to Red Hook, in correspondence with the grant in the charter of 1708; and also to low water mark on the west side of the Hudson River, or as far as the limits of the State extended.

In 1803 (March 8th, Sess. Laws, p. 225), the number of the wards was increased to nine, and the boundaries changed. The same principle was, however, adhered to, of making some of the wards to include the land under water, up to low water mark on the Long Island and the Jersey shore.

By an act of March 18, 1808 (Sess. Laws, 275), the Seventh Ward was divided into two parts, one retaining that name, and the other to be called the Tenth Ward.

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The act recited the great increase in the number of electors, and the impossibility of collecting their votes within the period allowed for electing. The second section provided for an election of an Alderman, Assistant, &c., for the new ward.

An act to equalize the wards was passed on the 15th of April, 1817, retaining the same number (Sess. Laws, p. 341). Another statute, passed 16th of April, 1825, increased the number to twelve, and made a new division. In 1827, the number was made fourteen; and, in 1832, fifteen, by a division of the former Ninth Ward.

By a statute of March 16, 1836, the Tenth Ward was formed out of a part of the Twelfth (Sess. Laws, p. 21). In 1837, the Seventeenth Ward was made out of the Eleventh (Sess. Laws, p. 12). In 1846 (Sess. Laws, p. 15), the Sixteenth Ward was divided, and the Eighteenth erected out of part of it.

By a law passed 16th of April, 1850, the Twelfth Ward was divided, and the Nineteenth Ward formed from a portion of it; and by another act, passed July 9, 1851, the Twentieth Ward was formed out of a part of the Sixteenth Ward.

Chancellor Kent states, in relation to the statute of 1803, that "the increase of the wards, and consequently the number of Aldermen and Assistants, was a material alteration in the chartered organization of the Common Council, and it was done without their application or consent. It became, therefore, a question in the Council of Revision whether the alteration, without such assent, ought to be made. But the objection, raised and supported by one of the members of the Council, was overruled, and the bill passed without requiring a consent, and became a precedent for future alterations of the like kind."*

Other statutes have been subsequently passed for further alterations, which need not be noticed here.

* Notes and Illustrations, ed. 1851, p. 215.

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CHAPTER III.

PROPERTY OF THE CORPORATION IN LANDS AND HEREDITAMENTS AND THE TITLE THERETO.

I shall consider this subject under the following heads:

1. The capacity of the Corporation to take and hold lands.
2. The sources of the title to lands on New York Island.
3. What lands were held in April, 1686, the date of Dongan's charter, under Dutch ground briefs, English patents, or were vested in the Corporation, or passed to it by that charter.
4. Titles under particular statutes.
5. Titles to particular parcels.
6. Land under water on the Long Island shore.
7. Land between high and low water on the Island.
8. Right to four hundred feet below low water.
9. Rights in wharves, piers and slips.
10. Ferries.
11. Rights in streets.
12. The exterior line of streets.
13. Roads.
14. Markets.

SECTION I.

CAPACITY TO TAKE AND HOLD LANDS.

Power to take and hold real estate.

Beside the general power, appurtenant to a corporation aggregate, of acquiring, holding and disposing of real estate, the charter of Dongan expressly conferred it upon the Corporation of New York.

In the 6th section it is provided, that "the Corporation

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and their successors forever, by the name of the Mayor, Aldermen, and Commonalty of the city of New York, be, and shall be forever thereafter persons able, and in law capable, to have, get, receive and possess lands, tenements, rents, liberties, jurisdictions, franchises and hereditaments, to them and their successors in fee simple, or for term of life, lives or years, or otherwise; and also goods and chattels, and also other things of what nature, kind or quality soever; and also to give, grant, let, set and assign the same lands, tenements, hereditaments, goods and chattels; and to do and execute all other things about the same, by the name aforesaid."

Again, in the 12th section of the same charter, the grant was, that "they, the Mayor, Aldermen, and Commonalty and their successors, be forever persons capable and able, and shall have full power to purchase, have, take, and possess in fee simple, lands, tenements, rents and other possessions within or without the said city, to them and their successors forever, so that the same exceed not the yearly value of one thousand pounds per annum; the statute of mortmain, or any other law to the contrary notwithstanding; and the same lands, tenements, hereditaments and premises, or any part thereof, to demise, grant, lease, set over, assign and dispose at their own will and pleasure, and to make, seal and accomplish any deed or deeds, lease or leases, evidences or writings, for or concerning the same, or any part thereof, which shall happen to be made and granted by the said Mayor, Aldermen, and Commonalty of the said city for the time being."

The 1st section of Montgomerie's charter, in like manner, declared the capacity of the Corporation, by the same corporate name, to take and hold lands and hereditaments; and to grant, demise, assign, sell or otherwise dispose of the same. The language so closely resembles that of Don-

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gan's charter above quoted, that I have thought it unnecessary to transcribe it.

By the 36th section of this charter, the Governor gave and granted to the Mayor, Aldermen, and Commonalty, full power to take and hold lands, tenements, hereditaments, rents, &c., with full power to grant, demise or dispose of the same at their pleasure. The restriction is as follows: "So as the manors, messuages, lands, tenements, hereditaments, rents, and other possessions, and real estate which the Mayor, Aldermen, and Commonalty of the city of New York shall and may have in their possession and seizin, at any one time, exceed not in the whole the clear yearly rent or value of three thousand pounds per annum, money of our realm of Great Britain, beyond and above all charges and reprises." Restriction as to amount.

Chancellor Kent says: "The limitation of the amount of lands to be held by the Corporation means only that the value be within the sum prescribed, when purchased or taken by the Corporation. If the lands should afterwards rise in value, by good management, or by extraneous causes, or any means whatsoever, the title of the Corporation is not thereby affected. The yearly value at the time is all that the limitation requires. This reasonable rule of construction is founded on the common law." (2 Coke's Inst., 722.) (Kent's Notes, note 48.)

In The People *vs.* Lowber (7 Abbott's Rep., 158–176), Mr. Justice Ingraham, after deciding that the right conferred by the charter, to establish markets, involved the right to purchase and hold real estate for that purpose,* observed upon the limitation as to £3,000 of annual rents, that "it might well be questioned whether, under the various acts of the Legislature, any force remained in this limitation. The Legislature, having

* See also Ketchum *vs.* The City of Buffalo, 14 N. Y. Rep., 356.

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so repeatedly provided by law for the purchase of lands, which far exceed in value and rent the amount to which the Corporation was originally limited, have virtually annulled this provision, and rendered it nugatory. The increase from property thus authorized to be purchased far exceeds in value the limited amount, exclusive of the increase which has taken place in the property purchased originally within the limitation.

"But, if there was any virtue remaining in the restriction, there are several reasons why it does not apply to the purchase in this case.

"For the reason above stated, that the right to establish a market, or markets, as shall be from time to time ordered and erected, necessarily conferred the power to hold the land on which such market was to be erected.

"The two provisions of the charter must be construed so as to give effect to both; and while this limitation is to be applied to the purchase of land by the city for other purposes (if it now has any force whatever), it does not destroy or control the right previously conferred, to erect and establish markets, and, as a necessary consequence, to purchase lands therefor, as the Corporation shall deem proper."

If this principle of the learned Judge is sound (and few opinions are entitled to more weight upon this subject than his own), it applies equally under the Mongomery charter, to ground purchased for bridewells, houses of correction, and work-houses, to alms-houses and gaols. (§ 23, Charter.)

As to the suggestion, whether the limitation as to the annual rent has not been annulled by the acts of the Legislature referred to, the remark naturally occurs, that such acts are of the nature of enabling statutes. If the common law capacity to take and hold lands (at least for pro-

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per corporate purposes) was not restricted by the limitation in question, these statutes would scarcely have been necessary; and, the argument seems as strong, that they do in effect recognize the limitation, as that they destroy it.

A vast deal of the property now held by the Corporation is held under statutes expressly empowering it to take for particular purposes. Thus, under the Common School Act of July 3, 1851, section 25, the title to all school property, real and personal, purchased with any money derived from the school moneys, or raised by taxation, shall be vested in the Mayor, Aldermen, &c. A large amount of property is held under this act. See also the act of April 11, 1842, § 7, Sess. Laws, ch. 150.

In the Farmers' Loan and Trust Company *vs.* The Mayor, &c. (Superior Court, General Term, November, 1858, 4 Bosworth's Rep., 80), the Court say that, "whatever might be the legal operation of the restriction in question, it was a restriction upon the right to hold lands in perpetuity, which, upon common law principles, belongs to a Corporation. It did not affect the question of a power to hold lands for a particular period in order to fulfill a duty, and in the exercise of a power necessary for municipal purposes. The right to hire a pier, to facilitate the removal of nuisances, was necessarily implied."

We would, I think, be warranted in saying that no individual could take advantage of this restriction, if it remain in force—that the State alone, through the courts, could interfere, and that it must be proven that lands exceeding the annual value have been acquired by purchase after the charter of 1730, independent of all lands granted by it or other charters, independent of lands acquired for admitted corporate purposes, and independent of lands obtained under particular statutory provisions; but purchased and taken for indefinite or unwarranted purposes.

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A restriction upon the power of the Corporation to acquire property exists under the street laws. The act relating to the city of New York (2 R. L., 416, § 179), authorizes the taking of fractional parts of lots, where the other portions have been taken for a street, and vesting them in the Corporation.

Yet, in Embury *vs.* Connor (3 Comstock, 511), the Court of Appeals held, that land taken under this statute, which was not strictly necessary for the widening of the street directed, was not legally appropriated to the public use. A part of a larger lot was necessarily taken, and the strip left was awarded to the Corporation. The act, so far as permitted this, was held void, unless a consent was obtained. In the same case, however, it was decided, that acts in *pais*, such as acceptance of a sum of money awarded as the value of the lot taken, would indicate such a consent, and bar the owner. Thus the Corporation would be vested with the title.

An action brought by the party for such damages would be evidence of such an assent. (Baker *vs.* Brannan, 6 Hill, 47.) See, also, Barton *vs.* Draper, 5 Duer's Rep., 130.

SECTION II.

SOURCES OF TITLE TO LAND ON THE ISLAND.

It cannot be questioned, at this day, that the right of discovery and occupation of New Netherlands, and particularly of Manhattan Island, was in the Dutch; and that the claims of the English were unfounded. The subject is frequently referred to by Mr. Broadhead, in his History of New York. He particularly states a formal defense of the title transmitted by the West India Company to the States General in May, 1632, citing Holland Documents, p. 209.*

* Broadhead's History, p. 215.

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The doctrine recognized by the Supreme Court of the United States, that the title to possessions in America was by discovery, and that the Indian tribes were regarded as temporary occupants of the soil, was as applicable to the Dutch Government as to the English sovereign. (8 Wheaton, 595; 16 Peters, 367.)

Under the settled principles on this subject, the discovery was for the benefit of, and vested the title in, the States General. It does not appear that the States General ever granted the ultimate sovereignty of the lands in New Netherlands to the West India Company.*

In 1626, the island, estimated at about twenty-two thousand acres of land, was granted by the Indian chiefs to the Dutch West India Company. The purchase of this island is thus announced, in a letter from Mr. Peter Schagen to the States General, of the 5th of November, 1626: "Yesterday arrived here the ship, The Arms of Amsterdam, which sailed from New Netherland, out of the River Mauritius, on the 23d of September. They report that our people are in good heart there, and live in peace; the women, also, have borne some children there. They have purchased the island Manhattes from the Indians, for the value of sixty guilders; 'tis eleven thousand morgens in size. They had all their grain sowed by the middle of May, and reaped by the middle of August." (Holland Documents, vol. i., p. 37.)

In the address of the Assembly of the XIX to the States General, of the 25th of October, 1634, it is stated, "that after the countries passed into the hands of the incorporated West India Company, not only were the above forts renewed and enlarged, but said Company purchased from the Indians, who were the indubitable owners thereof, the

* See Broadhead's History, pp. 134, 136, and 216.

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island of the Manhattes, situate at the entrance of the said river, and there laid the foundation of a city." (Holland Documents, vol. i., p. 94.)

Mr. Broadhead has done me the favor to refer me to De Lait (2d ed., 1630), who speaks of "an island called Manhattes, or Manhattan Island, because this nation of Indians possessed the same, and by them it had been sold to the West India Company." (See 2d series N. Y. Historical Society Collections, II., p. 373.)

And it deserves notice that, in the ground briefs of the Dutch Governors, they convey in the name both of the States General and the West India Company.*

The doctrine which I have adverted to, as to the Indian right, is explicitly and carefully stated in the cases of Ogden *vs.* Lee (6 Hill, 546), and Wadsworth *vs.* The Buffalo Hydraulic Comp. (15 Barbour, 83). "The sovereignty and ultimate title was in the European nation which made the discovery; but the immediate right of possession was in the Indians. The claim set up and asserted amounted to little more than a pre-emption, or the right of purchasing from the Indians all the lands within the bounds of their respective discoveries, to the exclusion of other nations. The charters and patents granted for lands in this State, before the Indian title was extinguished, gave only the ultimate fee or right of dominion, after such extinguishment. The title of the Indians, by occupancy, has been uniformly acknowledged, both by the colonial and State Governments, from the first settlement of the country." (Per Bronson, Justice, 6 Hill, 548.)

It follows that the West India Company, having obtained the Indian title in 1626, united in itself the absolute ultimate sovereignty, with actual title by occupancy, and the entire estate; or the latter, with the ultimate sover-

* See Note 23.

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eignty in the States General. The last position seems to me the best warranted.

I do not think that any grant can be found for land on the island before 1626. The earliest I have met with is 1636.

Upon the final possession by the English, under the treaty of 1674, the title to all the lands on the island became vested in the crown of Great Britain, except as to lands granted by the previous Dutch or English governors, or under the Great Seal; and was vested, as to all other lands, in those claiming under grants from one of such sources.

No proposition can be more clear, than that the effect of the conquest, surrender and treaty, was to transfer the title to the lands, not granted away, into the new sovereignty.

Neither can it be questioned that the Dutch ground briefs were, and are, indisputable sources of title, with or without a confirmation.

The great case of North Hempstead *vs.* Hempstead* sufficiently settled this point. Under Kieft's patent, and before the confirmation by Dongan, numerous grants were made by the town of Hempstead to individuals, whose titles were undisputed. The cases also of Jackson *vs.* Waters (12 John. Rep., 365) and Le Frombois *vs.* Jackson (8 Cowen, 590) recognize the only valid source of title to be the grant of the State, or colonial government, and settle that, as the French king had never dominion of the province, his grant was inoperative.

The language of the third article of the surrender, of 1664, is this: "That all people shall continue free citizens, and enjoy their lands, houses, goods, &c., whereso-ever they are within the country, with power to dispose of the same as they please."

* 2 John. Ch. Rep., 324, under the title of Denton *vs.* Jackson (1 Hopkins, 328; 2 Wendell, 110).

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Surveyor-General Colden, in his remaks upon the state of lands in the province of New York, in 1732, adverts to the proclamation of the Commissioners in 1664, and the third article of surrender, and says: "Under this the inhabitants took out confirmations of their lands and tenements, under the hand and seal of Governor Nicols, the first English governor, in which their title under the Dutch is recited."*

Governor Tryon also, in his valuable letter to the Board of Trade, in 1772, after quoting the third article of the surrender, observes: "Some lands of the province are held under the Dutch grants, without any confirmation of their title under the crown of England; but the ancient records are replete with confirmations and grants, which the Dutch inhabitants were probably more solicitous to obtain, from an apprehension that the Dutch conquest of the province of 1673 might render their title under the articles of capitulation precarious, though the country was finally restored to the English by the treaty of 1674."†

Again, by one of the laws of the Duke of York, published in 1664, it was enacted: "To the end that all former purchases may be ascertained to the present possessor or right owner, they shall bring in their former grants, and take out new grants for the same, from the present governor, on behalf of his Royal Highness, the Duke of York."‡

By the amendments promulgated the 26th of February, 1665, such former purchasers were to bring in their patents for renewal, by or before the beginning of the next Court of Assizes, and the renewal fee was two shillings and six pence for each hundred acres.§

By a subsequent and important article, it was declared,

* Colden MSS. New York Historical Society.

† Transcribed in Valentine's Manual, 1852.

‡ Collections New York Historical Society, vol. i., p. 339. § Ibid., p. 600.

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"that it was to be understood, that all old grants which are to be brought in are to be confirmed and returned to the parties; and where no lawful grants are, or they shall be doubtful, new and legal grants shall be obtained." *

In October, 1666, among the conditions and amendments adopted by the Governor and Court of Assize, was one declaring, that unless the old patents were renewed by a certain day, neither town nor private person should have liberty to plead any such grants, patents, or deeds; but they should be looked upon as null and void. It was recited that several towns and persons hold their lands upon condition of their being subject to the States of the United Belgic Provinces, which was contrary to their allegiance.†

We must remember that the articles of capitulation extended the privileges only to such as should acknowledge and testify themselves to submit to his Majesty's government; so that, even on the assumption that this law was valid, we have the clear proof that the confirmations were only to recognize the new allegiance, and vacate the repugnant condition in the grants.

The instruments of confirmation (which I have examined to a considerable extent) always, as I believe, recite the Dutch ground-brief, and employ words of confirmation. They also contain granting words. See a copy of one of them, note No. 23.

The sound conclusion, I apprehend, is, that the surrender did in effect supersede and abrogate the clause of allegiance, and that the confirmations were intended, besides giving fees to the governors, to effect expressly the same object, and to substitute the English authority, viz.: the Duke of York as the Lord Paramount. In every other

* Collections New York Historical Society, vol. i., p. 473. † Ibid., p. 489.

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particular, the right of property, and the qualifications of that right, remained unchanged.*

If it could be maintained, that the effect of the repossession by the Dutch, in 1673, and the war, rescinded all these stipulations and privileges, the answer is decisive, that by Andros's proclamation of 1675, under the Treaty of Peace, and restoration to the English, all grants and concessions and estates were confirmed.

And I consider it to be a very plain proposition that the tenure, estate, rights, and servitudes, attached by the law prevalent in the New Netherlands to the holding of real property, governed and applied to the ground briefs and all the transports under them, made while the Dutch were in possession.

That law, as before stated, was the will of the Company, as expressed in instructions or declared in ordinances, and in cases not thus specifically provided for, the civil law, and the statute law, edicts, and customs of the fatherland. (See *ante*, p. 10.)

The Roman law was adopted in the Netherlands, wherever particular provisions did not obtain. (Van Leuwen, Roman-Dutch Law, p. 2, 3. Van der Linden on the Laws of Holland, p. 57.)

And this was the law which prevailed in the Dutch colonies. (Van der Linden, p. 12.)

The date of Dongan's charter, April 27, 1686, forms a convenient period at which to ascertain the state of the titles. All the land that had not been patented or appropriated was granted by the sovereign authority to the Corporation, by the third section of the charter, considered under the next head. And thus the ground briefs, such original English patents as had been made, and the grant

* Mr. B. F. Butler, in his Historical View of the Constitution of New York, p. 31, takes a similar view.

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to the Corporation became the sources of the title to the whole land of the island. The few exceptions, by reservations in the charter, are particularly noticed hereafter.

SECTION III.

LANDS HELD IN APRIL, 1686, UNDER GROUND BRIEFS—UNDER ENGLISH PATENTS—AND WHICH WERE THEN VESTED IN THE CORPORATION.

This subject is of importance in many particulars, but in relation to the streets of the city, of very great moment. A division line of considerable moment is furnished by the act of 1807, and the Commissioners' map made under it; for the system then adopted, has remained the system to this day; all subsequent legislation being of amendment or alteration.

By that act the Commissioners were "to lay out streets within that part of the said city of New York to the northward of a line commencing at the wharf of George Clinton, on Hudson River; thence running through Fitzroy Road, Greenwich Lane, and Art street, to the Bowery road; thence down the Bowery road to North street; thence through North street, in its present direction, to the East River."

It is of less importance to show the character of the original sources of title to the lands to the northward of this line; but some of the most important of the parcels have been noticed in the Appendix, No. 57.

But as to the southward of it, I have collected a great mass of materials from original sources; and have attempted to show that measurably the greatest part of the whole ground is now held under Dutch ground briefs. The exceptions are stated in detail in Appendix, No. 57, and are remarked upon hereafter.

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I have taken the date of Dongan's charter, April 27, 1686, as the period at which to show the situation of the title. The Dutch rule had finally terminated. The bulk of the ground briefs had been confirmed. A few English original patents had been issued. The reservations in this charter were specific, and what land remained vacant and unappropriated was given to the Corporation.

I will state briefly the results arrived at from the authorities and documents I have examined.

And FIRST, as to the reservations in the Dongan charter.

1. There was saved to his Majesty and his successors, and his Governors, &c., all the right, use, title and authority, which they had in Fort James, in and by the city of New York, and in the liberties, boundaries, and privileges thereof, for the maintenance of the said fort or garrison. (§ 16.)

2. Also to one messuage, or tenement, next the City Hall.

3. To one messuage by the fort now in the possession of Thomas Coker.

4. The piece of ground by the gate, called the Governor's Garden.

5. The land without the gate, called the King's Farm.

6. The swamp next to the same land by the fresh water.

THE EXCEPTIONS IN DONGAN'S CHARTER.

Forts James and George—the Battery.

In the charter from Dongan, there was excepted from the grant of land, all the right, title and interest of the king and his successors and assigns in Fort James, in or by the city of New York, and in all the liberties, boundaries and extent thereof.

In the charter of Montgomerie, a similar exception was made as follows: "Also except our Fort George, in our

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city of New York, and the ground, full boundaries and extent thereof or thereto belonging."

These parcels of land therefore fell, upon the Revolution, to the people of the State.

On the 16th of March, 1790, an act was passed as follows: "Whereas, Fort George, in the city of New York, and the Battery adjacent thereto, are at present useless for the purpose of defense. Be it enacted, &c., that all that part of Fort George, in the city of New York, and the lands adjoining thereto, belonging to this State, beginning at a stake standing on the easterly side of the Broadway, continued, at a place which is eighty-six feet distant, on a course south 37° 45′ east, from the south-east corner of the house of Captain Archibald Kennedy, and running thence easterly to the north-east corner of the old secretary's office, in Whitehall street; thence southerly along the west side of Whitehall street to the ground of Captain Thomas Randall; thence westerly along the north side of his ground and along the rear of the lots which front on Pearl street, as far as they extend; then north 57° 45′ west, until a course north 32° 15′ east will strike the place of beginning; and then north 32° 15′ east, to the place of beginning, shall be, and hereby are, declared to be forever reserved for the purpose of erecting public buildings, and such works of defense as the Legislature shall, from time to time, direct. And further, that the same shall not at any time hereafter be sold or appropriated to or for any private use or purpose whatsoever."

The Government house and grounds.

By the second section, all the lands belonging to the people of the State within the bounds following, to wit: "Beginning at the north-east corner of the old secretary's office, and running thence southerly along Whitehall slip; then southerly, westerly, and northerly along the East River, the bay and Hudson River to the north side of the

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street which runs on the south side of Archibald Kennedy's house, continued, to Hudson's River; thence along the same to the south-east corner of said Kennedy's house; thence south 37° 45' east, eighty-six (86) feet; thence easterly to the place of beginning (excepting thereout that part reserved to the people of this State, as prescribed in the preceding section of this act), as well as all the lands within the limits and bounds aforesaid, which the said Corporation of New York claim title to, shall be, and the same are hereby, vested in the Mayor, Aldermen, and Commonalty of the city of New York, to remain for the purpose of erecting public buildings and works of defense thereon, but without any power to dispose thereof for any other use or purpose whatever, and without any power of selling any part thereof."

The third section authorized the Mayor, &c., to demolish Fort George, and to level the ground whereon it stood, and also to cause a bulkhead to be erected from the end of the bulkhead lately erected by them, continuing the same to the south-west bastion of the Battery.

Soon after the passage of this act, and in the year 1791, a survey of the Battery was made by Casimin Goerck, one of the city surveyors. A transcript of it is to be found in Atlas No. 7, map 2, in the Street Commissioner's office. The north-westerly point of the description in the statute corresponds with the easterly corner of First street, as that street is laid down on all the maps, and in the grants from 1739 to 1770. There cannot be a question that the base line of the charter of Montgomerie terminated on the south side of Marketfield street, opposite the easterly corner of First street.

Thus, then, while the title of the Corporation to Marketfield street, from Broadway, for one hundred and twenty-two (122) feet, viz.: to First street, is derived from the

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State, and is held upon the same tenure as the Battery, the title to all of the street below that point into the Hudson River, for four hundred feet below low water, arises from the grant in the charter, and the legislative confirmations.

And the statute of the 27th of March, 1821, next cited, corroborates this view. It authorizes an extension of the Battery, without including the street, or any part of it.

By that statute* the Common Council was authorized to extend that part of the city, usually called the Battery, into the bay, and North and East Rivers, such distance as they may deem proper, not exceeding six hundred feet. And it was enacted that all the title of the people of the State, in and to the land, and land under water in front of, and adjoining to the said Battery, and extending from thence into the bay and North and East Rivers, a distance not exceeding six hundred feet, shall be, and the same is hereby, vested in the Mayor, Aldermen, and Commonalty of the city of New York, and their successors, to remain for the purpose of extending the Battery for a public walk, and for erecting public buildings and works of defense thereon, but without any power to dispose of the same for any other use or purpose whatever, and without any power of selling it, or any part thereof.

The act also authorized the raising of a sum of money by tax, for defraying the expense of the extension. A portion of the Battery, with a certain extent of land under water, was, in November, 1807, ceded by the Commissioners of the State to the United States, for purposes of fortifications, and was subsequently reconveyed.

Government House lands.

The land reserved by the State in the act of March 16, 1790, for a Government House, was sold by the State to the Corporation, by virtue of an act of May 25, 1812, for the price of fifty thousand dollars. The act contained a

* Sess. Laws, ch. 172, p. 158.

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proviso, that the Corporation should not have the right of selling the said grounds for the erection of private buildings or other individual purposes.*

By the seventh section of an act, passed April 13, 1813, this proviso was repealed, and it was provided that, if the Corporation should not purchase the Government House and grounds by the first day of November ensuing, the power given to the Comptroller to sell the same should cease.†

A statute was passed on the 11th of February, 1814, which recited, that the Corporation was desirous of becoming possessed of the lands now in the possession of the United States, bounded easterly by Whitehall street, southerly by Bridge street, westerly by State street, and northerly by the grounds adjoining the Government House lately sold by the people to the Corporation—that they had offered to grant to the United States other property in exchange for such lands, which they were willing to accept, but that the said lands granted to the United States were to provide for the safety and defense of the city, and were to revert to the people in case they should cease to be applied to such purposes. It was thereupon enacted that the Commissioners of the Land Office might grant all the right, title and interest of the people of the State, in such lands whenever the said exchange should be effected, and that the United States should declare that they no longer required the land for the purposes aforesaid.

And, by the second section of such act, the consent of the Legislature was given to such grant as might be made by the Corporation to the United States in exchange for the above-mentioned lands, and that the jurisdiction of the State over such lands should be, and was thereby, ceded to the United States, provided that such cession should not

* Session Laws, 1812, p. 196. † Ibid., 1812, p. 223.

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prevent the execution of process, nor the operation of the laws of the State or ordinances of the Corporation upon such lands, so far as the same may not be incompatible with the free use of the said lands by the United States. And also provided, that the lands so to be granted by the Mayor, Aldermen, &c., to the United States, should be so granted expressly for the purpose of providing for the safety and defense of the city and port of New York; and that such lands shall pass to and be vested in the people of the State in case they shall cease to be applied to the purpose aforesaid.

By a statute, passed March 4th, 1814 (Sess. Laws, ch. 18, p. 29), this last proviso was repealed.

In 1815, the Corporation made sale of the lands purchased from the State, under the act of May 26, 1812, and in the deeds given to the purchasers a clause was inserted, by which the Corporation covenanted and agreed that the vacant grounds, belonging to the parties of the first part, in the vicinity of the premises thereby granted, and commonly called the Battery and Bowling Green, should never be appropriated by said parties of the first part, or their successors, to private uses.

On the 30th of May, 1851, the Counsel of the Board was called upon to state his opinion as to the nature of the title of the city to the grounds called the Battery, and whether any legal objections exist to an enlargement or sale of any part or the whole of the said grounds. *

After stating the statutes before referred to, he concluded that it was competent for the Corporation to enlarge the Battery to the extent of the six hundred feet granted by the State; but without the consent of the State, and of the owners of the lands purchased from the city, and

* Document No. 47, Board of Aldermen.

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formerly known as the Government House, and conveyed in 1815, it was not competent for the Corporation to make sale of the Battery grounds, or any part thereof.

The Battery, &c. (*Castle Garden*).

In the case of Phœnix *vs.* The Commissioners of Emigration (1 Abbott's Rep., 466; 13 Howard's Rep.), various questions connected with these parcels of property arose. The defendants having employed Castle Garden as a place of landing and keeping emigrants for a certain time, an action was commenced against them by adjoining owners, to enjoin them from such a use, on the ground of a violation of covenant, and as being a nuisance or highly injurious. It was held, at Special Term, May, 1855:

1. That the land upon which Castle Garden stands, and the Battery, did not pass under the Montgomery charter by the grant of the four hundred feet. The lines of that grant expressly exclude those premises. The exception, in the charter, of Fort George "and the grounds, full boundaries, and extent thereof, covered the portions of the present Battery ground, which was upland or down to low water."

2. The act of the 16th of March, 1790, in the second section, gave to the corporation all the lands belonging to the people of the State, within the limits described, as well as all the lands within such limits claimed by the Corporation, except the lands reserved in the first section. The exception was the ground fronting the Bowling Green, and running to the rear of the lots fronting on Pearl street, which it is here sufficient to indicate as the Government

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House grounds. The recital shows that the intention was to convey Fort George, and the battery adjacent thereto. The Corporation was to hold the premises "for the purpose of erecting public buildings and works of defense thereon, but without any power to dispose of the same for any other use or purpose whatever, and without any power of selling any part thereof."

In 1791, a map was made by J. Goerck, city surveyor, which shows the line of the Battery as it then existed, and as it indeed continued until after 1821. It will be noticed that its general course was nearly straight, with the exception of a bastion near the northerly end, which projected irregularly to the westward of the line. It will also be noticed that the whole of Castle Garden, and of the bridge leading to it, are outside, or to the westward of this line. This is shown upon the same map, in connection with the outline of a survey made by Bridges, surveyor in 1807, and traced upon it.

3. The grant by the Corporation to the Government of the United States, of the 17th of November, 1807, comprises two parcels of ground: First, an oblong, described by metes and bounds of 310 feet, and 300 on its westerly and easterly sides, and 200 feet and 125 feet on its northerly and southerly sides. The map of Goerck, with the additions, exhibits this parcel distinctly.

A careful examination of the map shows that a portion of this oblong was outside, that is, to the westward of the limits of the grant in the statute of 1791. It was beyond the bastion. But another portion of such oblong was within the statutory grant, for it comprised the bastion, as it is shown on the map of Goerck. Although the lines are not run particularly, there can be no doubt that the bastion passed under the statute. The first portion, then, of this transfer to the United States comprised one parcel of

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land clearly belonging to the Corporation, and another parcel, the title to which is not clear. The dimensions of the whole parcel may be roughly stated at 49,000 superficial feet; the parcel, the title to which is not traced, at about 30,000.

But the next clause of the conveyance of 1807 grants all the right, title and interest of the Corporation "to all that water lot, vacant ground, and soil under water, to be made land, and gained out of the Hudson River, of the breadth of three hundred feet, lying on a course south sixty-four degrees west," adjoining the other parcel of ground. The length into the river is left indefinite.

The habendum of this conveyance is, that the premises are to be held for the uses and purposes described. These purposes are expressed in the reservation, viz.: "For constructing and erecting of fortifications for the defense of the port and harbor of New York." The condition expressed in the conveyance is, that if at any time hereafter the premises should cease to be used for the purposes of fortifications, or for any other purposes in which the public may be immediately interested, then the premises should revert to and be reinvested in the Mayor, Aldermen, &c., and they should and might enter upon the same as of their former estate.

As the Corporation does not appear to have a particle of title to the land under water, secondly described in their conveyance, it is not to be imagined that the United States would have been content with that mere quit-claim of an assumed interest. The following statutes, however, explain the history of the title very satisfactorily:

By an act of the 20th of March, 1807, the governor, lieutenant-governor, chancellor and others, were appointed commissioners to declare the assent of the Legislature to the cession of lands on Staten and Long Island to the juris-

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diction of the United States, for purposes of defense. (Sess. Laws, 1807, ch. 51.)

By an act of the 18th of March, 1808, the commissioners appointed under the former act had their powers extended to lands in the city and county of New York, and to lands covered with water in said city and county of New York, provided that the cessions to be made of such lands should be necessary for the defense and safety of the city of New York. (Sess. Laws, 1808, ch. 51.) By the 4th section of this act, such commissioners were empowered to grant to the United States, for the purpose of providing for the defense of the city, the use of any of the lands and waters belonging to the people of the State, in the said city and county of New York, which lands shall be granted on the express condition of their reverting to the people of this State in case they are not applied to the purposes aforesaid. (See also an act for the extending of Bridge street to the Battery, passed April 8, 1808, chap. 168.)

It appears from the Revised Statutes of 1830 (vol. i., p. 68), that a deed of cession was made by these commissioners, dated the 6th of July, 1808, of the parcel of ground at the foot of Hubert street, and of a portion of the premises now in question. The deed of cession is stated to be in the Secretary of State's office.

The boundaries of this cession are very particular. The point of beginning is the same as in the re-lease from the Corporation. The easterly line is the same; so is the course of the northerly line; but the depth into the river is 500 instead of 200 feet; the length on the westerly side is the same, and on the southerly the depth is 425 feet, instead of 125.

We thus see, that from the same base line at the eastward, the line of the cession by the State ran 500 feet into the river—that of the Corporation 200 feet. The latter

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line ran to a point upon the bridge, about one-third from its commencement.

The cession by the State contained a provision that the United States were to retain the use and jurisdiction so long as the two tracts should be respectively used and applied to the purposes of defense and safety to the city and port of New York, and no longer.

An obscurity exists as to the ground of the claim of the Corporation to run 200 feet into the river. The State did not concur in it.

But supposing the claim well founded, we have then the United States holding the property under a cession of the use and jurisdiction, not the fee, from the State, for the westwardly three hundred feet, and under a transfer from the city for the residue, with a clause of reverter upon its disuse.

4. In this situation the act of the 27th of March, 1821, was passed. The Corporation was authorized to extend that part of the city usually called the Battery, into the river six hundred feet, and all the title of the people of the State, in and to the land, and land under water, in front of and adjoining to the said Battery for that distance, was vested in the Mayor and Commonalty, "to remain for the purpose of extending such Battery for a public walk, and for erecting public buildings and works of defense thereon; but without any power to dispose of the same for any other use or purpose whatsoever, and without any power of selling it, or any part of it." Under this act, the reversionary right of the State to the land under water on which the castle stands, and to most of that over which the bridge ran, thus passed to the Corporation upon the tenure expressed.

5. We thus arrive at the consideration of the act of Congress, of March 30, 1822. The President of the United

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States was authorized to cause the works to be dismantled and disposed of, and to reconvey to the Corporation the tract of land granted by them. This operated upon the parcel first described in the conveyance from the Corporation, and restored that body to the rights it possessed in 1807. The express condition of the cession by the State would have reinvested the people with their original right and title but for the act of 1821, before noticed. The effect of that act of 1821 was, to substitute the Corporation for the State.

But the Corporation purchased the materials of Castle Clinton from the United States, and possession of the whole of the premises was delivered to it by General Scott, on behalf of the Government, about the 16th of June, 1823. (See resolution of that date.) The city has continued in possession, used, and leased it, with the occupation of the bridge, from that time to the present, for its own benefit and profit.

6. The operation of the act of May 25, 1812, and that of April 13, 1813, with the sale in 1815, by the Corporation, of the Government House grounds, and the covenants in their deeds to Jon. Hone and others, is next to be examined. The plaintiff claims under one of these deeds. The covenant is "that the vacant grounds belonging to the parties of the first part, in the vicinity of the premises hereby granted, commonly called the Battery and Bowling Green, shall never be appropriated by the parties of the first part or their successors to private uses." This covenant extended to the Battery as it then existed, and no further. Goerck's map of 1791 defined the limits, pursuing the boundaries of the act of 1790. The covenant did not cover an inch of the ground now in question. The Battery, as then defined, was much to the eastward of that ground. Castle Clinton—all the premises now in question

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—were in the possession of the United States, and might have been held by them in absolute ownership forever. I am clearly of opinion that the covenant cannot be extended to any land beyond the known limits of the Battery in 1815.

7. The lease to Allen for the premises in question, dated the 23d of March, 1854, comprises a parcel of ground described "as all that certain piece or parcel of land situate in the first ward of the city of New York, on the North or Hudson River, near the west end of the Battery, and on which the building erected for a fortification, and heretofore known as Castle Clinton, and now as Castle Garden, stands; but without any right of way by carts, carriages, or other vehicles, upon or across the Battery, or any part thereof, without the special leave of the Mayor in writing. The lessee to have no exclusive right to occupy or use the bridge leading from the said Battery to the Garden, except the right of the same for foot passengers, and to have no right of wharfage on either side thereof."

The premises, therefore, are Castle Garden proper, and the right of way over the bridge.

There is a covenant in the usual form, not to assign or sublet the premises without the assent of the Corporation.

An assent was given by the Comptroller, on behalf of the Common Council, on the 27th of March, 1855, sanctioning the assignment by Allen to Conklin. The duty and power to give such assent is conferred by the ordinance of 1844 (sec. 4 of title 4). The Comptroller has refused his consent to the assignment by Conklin to the Commissioners of Emigration, made by him on the 5th of May, 1855.

It is insisted that the want of such assent renders that assignment wholly void. It is replied that by consenting to one assignment the covenant is discharged. Dumpor's

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case (4 Coke, 119; Smith's Leading Cases, 15). Brummel *vs.* Macpherson (14 Vesey, 173) and Dakin *vs.* Williams (17 Wend., 447) have been cited. Whether, as the last case partly intimates, there is not a distinction between conditions and covenants in this particular, I need not consider. I am of opinion that it is for the Corporation alone to take advantage, by re-entry or otherwise, of any breach of the covenant. No one else can do so. And one among several reasons is, that the reception of rent after the breach would prevent a forfeiture. (Goodright *vs.* Davids, Cowper, 803.) It is stated in the affidavit of the Commissioners that they have paid rent since they took possession.

"I conclude this branch of the case with the following propositions, which appear to me to be established by the preceding review of the statutes and documents upon the subject.

1. That the plaintiff and other owners of the lots purchased in 1815 have no right, by virtue of the covenants in the deeds from the Corporation, or otherwise, as owners of such lots, to interfere with any use which the Corporation may make or permit, of the premises contained in the lease to Allen, and in question in this case.

2. That the Corporation of the city of New York are entitled to the building called Castle Garden, and the materials of the bridge, by virtue of their purchase from the United States, in 1823; and are entitled to, and hold, the fee of the soil under such building and bridge, by virtue of the act of 1821.

3. That the United States did not acquire the fee of these premises by the cession from the State in 1808, but only the use of and jurisdiction over the same; that this fee, subject to such right in the United States, passed to the Corporation by the act of 1821; that the act of Con-

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gress, and surrender of possession, discharged and extinguished this right of the United States, and inured to the benefit of the Corporation as grantee of the State; and thus the Corporation hold the property under the act of 1821, and according to the conditions, and upon the terms, prescribed by such act.

4. That, apart from the question of nuisance, no one but the people of the State has any right to interfere with any use whatever which the Corporation may think proper to make of these premises; that persons in the position of this plaintiff may, indeed, unite in a complaint, or act as relators with the Attorney-General, to prevent a perversion of the property; but the people, through that officer, must be parties to the action. It is needless to refer to any other case than that of the Broadway Railroad (11 Legal Obs., 359), to support this proposition. The condition attached to the grant by the State, and the purposes for which the land was bestowed, were all of a public nature—concerning all the inhabitants of the city at large.

5. That the want of the assent of the Comptroller to the assignment by Conklin, if legally necessary, and not dispensed with by reception of rent, is an objection, only to be taken advantage of by the Corporation itself."

The question was then examined, upon the allegation of a nuisance, and the injunction denied.

When the case was at the General Term, July, 1855, the Chief Justice (Oakley) concurred with the Judge below in denying the injunction, and assuming the views of the Judge, as to the operation of the act of 1821, vesting the fee in the Corporation by the State, and Congress, by the act of 1822, surrendering possession, relinquishing its title to the use, were correct; he agreed, in substance, that there was no trust created for the benefit of indi-

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viduals, and which private persons could enforce. (See 13 Howard, 5, and compare 1 Abbott, 473.

Mr. Justice Duer denied the accuracy of the view of the source of the title taken below, and held that it rested entirely upon the act of Congress of 1822. It was not in the power of the Legislature, whatever was its intention, to convey to the Corporation any title to the lands, or any part of them, which, under the act of 1808, had been ceded by the State to the United States. There was no interest in the land which could be the subject of a valid transfer. The State had a right to re-enter, but the fee passed to the Corporation from the United States, and the re-entry was barred by an adverse possession beyond the statutory period. The Corporation, therefore, took the property in absolute fee, discharged of all limitations or trusts.

2. *A messuage or tenement next the City Hall.*

The City Hall of this period was on Pearl street (Smits Vly), at the head of Coenties slip. It was sold in 1699, to John Redman; in the same year measures were taken for the erection of the City Hall in Wall street, at the head of Broad. (Manual, 1849, p. 353.)

On the 20th of December, 1656, Jacob Van Cowenhowen conveys a lot north of the City Hall, to N. De Meyer; being premises patented to him 12th December, 1643. (Book A, N. Y. Records; Manual, 1861, p. 591.) I have not been able to locate the lot thus reserved.

3. *A messuage by the Fort, now in the possession of Thomas Coker.*

In the boundary of the West Ward, in the boundaries of 1683, the beginning is at the house of Thomas Coher, so northward to the gate.

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Charles Sleigh.

The boundary of the West Ward, in Montgomerie's charter, is given in Section II. There can be no doubt that the beginning should be the west end of the street, going from the parade to the North River. The map of 1728 shows this plainly, as does Ratzell's map of 1706. Sleigh's house, mentioned in the boundary, belonged to Charles Sleigh, in 1709. He then mortgaged it. (N. Y. Records.) The premises came to Archibald Kennedy, who is mentioned as the owner, in the act of the 16th of March, 1790, before stated.

There can be no doubt that, between 1686 and 1728, this property was conveyed to Sleigh, or some one who conveyed to him.

4. *The piece of ground by the gate, called the Governor's Garden.*

In the similar reservation in Montgomerie's charter, it is called "that piece of ground near the English Church, called the Governor's Garden." (§ 37.)

Its extent is shown with reasonable precision, in the Appendix, No. 57. It comprised 81 feet of the Trinity Church property, and probably Rector street, on Broadway.

5. *The land without the gate, called the King's Farm.*

The statements in the Appendix, No. 57, show this parcel to have had a front on Broadway, from about Fulton to near Duane street, and to have consisted of at least three parcels of ground. The actual source of the title to one large parcel was undoubtedly the ground brief of Governor Stuyvesant. Trinity Church has successfully defended its title, on the basis of the letters patent of Cornbury, in 1705, and possession. But it seems very clear that the Royal Governors took as grantees under the

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Bogardus title. Andross' lease to Seckers, in 1667, for 30 years, was an assertion of title to the whole; and the proposition of Vice-Chancellor Sandford, that there was a legal presumption of a grant from all the Bogardus heirs, is, I think, indisputable. There was, from 1671 to 1705, a possession of the whole, under a claim of title to the whole. (4 Sandf. Rep., 726.)

Thus, in 1686, the King's Farm was in the Governor on behalf of the crown, subject to a lease granted by his predecessor, which would expire in 1707. Ryers claimed, it seems, under Seckers, recognizing first the title of the Governor, then of the Church.

6. *The swamp next to the same land (the King's Farm), by the Fresh Water.*

This parcel is shown to have been transferred by a royal patent, in 1733, to Anthony Rutgers. The land is pointed out in the Appendix (No. 57), and is held under that title to this day.

More minute details as to this parcel are stated *post*, Section III., Tit. "The Fresh Water Pond."

II. GRANTS OR APPROPRIATIONS OF ENGLISH GOVERNORS BEFORE 1686.

Outside the line of the map of 1807, there are many and considerable grants of Royal Governors, made before 1686. For example, Governor Andross to David Deffore, 9th October, 1677, for 60 acres. It was 80 rods on the water side. It comprised a parcel of ground between Fifty-second and Fifty-fifth streets, the East River, and the Post road. It ran, however, beyond or to the west of such road, being bounded north-westerly by the commons.

See the case of Van Amringe *vs.* Barnett, Superior Court, 1860.

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But, within the limits of that map, I do not find, with a few exceptions, a grant before 1686, which is not a confirmation of a Dutch grant, distinctly to be traced, or of the highest probability. The details and proofs are found in the Appendix, No. 57.

The exceptions are as follows:

The Vineyard.

Next adjoining the Shoemakers' Field on the north, was a strip of ground called the Governor's Vineyard, and, in some documents, Dongan's Garden. On the map of 1695 it is so called. The deed of partition of the Shoemakers' Field, made in 1696, bounds one parcel, south-easterly, on ground commonly called Governor Dongan's Garden. (See Appendix, No. 57.)

In May, 1685, a survey of the Vineyard was made, by direction of Governor Dongan, and on the 10th of June, 1685, John Knight conveyed the premises to Thomas Dongan. The description is found in the Appendix, No. 57.

In July, 1762, Thomas Dongan conveyed the premises to Thomas White. A map of the Vineyard is in the Register's office, made in 1759 (May 15th).

It is stated by Mr. Valentine that Dongan built a cottage on the Vineyard, and improved it. This, and his survey, may have been such an appropriation as excepted it out of his charter. How Knight got title, I have not ascertained. (See the deeds, Office Secretary State, 1684.)

The Lutheran Church.

In a petition of this church, made, I presume, in 1684, it is stated that they have first built out of the gate, but had been obliged, by Governor Colve, to tear it down. That they then got a patent for a piece of ground within the gate, and that the patent was mislaid. (Doc. Hist. N. Y., vol. iii., p. 484.)

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24th Feb., 1809, Lib. 82, p. 195. The Lutheran Church boundaries appear to be eighty-two feet six inches on Broadway, sixty-two feet in rear; north on Rector street, ninety-seven feet; south by J. R. Livingston. See, also, Deed-Book 8, p. 204, Albany.

The Fresh Water pond was made the subject of subsequent grants. The history and validity of these is discussed under the next subdivision of this section.

III. WHAT LANDS WERE VESTED IN THE CORPORATION BEFORE, OR BY, THE CHARTER OF APRIL, 1686.

The New Burial-place without the gate.

The oldest burying-ground of the city was on Broadway, in the vicinity of Morris street. In 1656, on a communication from the Lord General, it was resolved that it was necessary to establish a graveyard at another place, or repair the old one. In 1665, the church-yard was ordered to be repaired. On the 13th November, 1665, it was ordered to be removed. In February, 1676, the old church-yard was directed to be divided into four lots, of 25 feet each, and sold at auction. (Manual, 1853, Minutes Burgomasters, &c.)

Dongan's charter (section 1) recites, that the citizens and inhabitants had, at their own charge, built several public buildings, and conveniences for the said city; that is to say, the City Hall or State House, with the ground thereunto belonging, two market-houses, the bridge into the dock, the wharves or docks, with their appurtenances, and the new burial-place without the gate of the city. The second section grants and confirms to the Corporation this parcel of ground and premises, among other things.

In 1703 the Corporation conveyed this parcel to Trinity

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Church, describing it as the burial-place of the city (Deed in hands Comptroller Trinity Church).

In the colonial act, of the 27th June, 1704, it is recited, that the Church was in possession of this parcel, describing it as "without the north gate of the city, in or near a street called the Broadway; in breadth, on the east side, as the said street rangeth northward, three hundred and ten feet; on the south side, by the line of our garden." (Smith & Living., 60.)

The grant by the city to the church is recognized in this statute.

It should be noticed that, in May, 1697, an act of Assembly was passed, and contains a royal grant and confirmation of a certain church lately built in the city of New York, together with a certain piece or parcel of ground adjoining thereto, in or near a street without the north gate of the city, called Broadway.

The church was built in 1696.

We can readily understand that the title was very far from clear, until Trinity Church obtained the grant from the Corporation.

The ground is shown on Lines' map of 1728. It began about 42 feet south of the present line of Thames (then Stone street), and ran to about the south line of the present church, about 81 feet from Rector street.

The Cripple Bush.

The Corporation took this parcel as part of the waste lands, under the charter.

On the 20th of July, 1733, they granted the same to Jacobus Roosevelt. In February, 1734, a partition of it was made between the then owners. It contained four acres and a half. (Lib. 32, p. 482.) A map accompanies the deed (p. 431). The boundaries are stated in the Appendix, No. 57.

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The Fresh Water Pond.

It seems at first difficult to understand why the Corporation did not take the land under this body of water, by force of the Dongan charter, section 3. That grants all coves, creeks, waters, and ponds, as well as all vacant, unpatented land.

It appears that, on the 9th of August, 1694, Governor Fletcher made a grant of this property to John Evans, describing it as in the act of 1699, next stated. (Lib. 6 of Patents, p. 270.)

That act was passed in May, 1699, entitled "An act for the vacating, breaking, and annulling, several extravagant grants of land, made by Colonel Fletcher, late governor of this province." (Smith & Liv., i., p. 31.)

The act recites as follows: "Whereas, their Excellencies the Lords Justices of England have, by their instructions unto his Excellency the Governor, dated the 10th of November, 1698, directed his Excellency to use all legal means for the breaking of extravagant grants of lands in this Province." Then follows an enumeration of the grants of Governor Fletcher. Among them is the following: "Also another extravagant grant, made to John Evans, dated the 9th of August, 1694, containing a certain swamp and fresh pond, called the Fresh Water, and adjacent to the King's Farm, formerly called the Duke's Farm, on the Island Manhattan, beginning at a stake set in the ground on the south side of the said pond, and at the north-east corner of the land belonging to William Merritt; thence it rangeth along the south side of the said swamp and pond, by the upland to the beach on the east side of Hudson's River; so along the beach to the upland; thence crossing a small gut of said swamp to the land on the east side thereof; thence by the said land as it runs, to the east side of the tan-yard; and thence to the place where it begun."

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"*And whereas it does appear, unto his said Excellency and Council*, that all and every the above-recited grants and demises are in fact and deed absolutely extravagant grants, issued by the said Colonel Fletcher, late Governor of the Province, contrary to, and against the trust reposed in him by his said Majesty, and are extravagant grants, according to the true intent of their Excellencies', the Lords Justices of England, said instructions, and ought to be broken and annulled."——

The 1st section then declares such grants to be thereby broken, vacated, and annulled, and his Majesty to be fully and immediately reseized and repossessed of all such before-granted and demised premises.

And the second enacts, that such of the said grants as are registered be obliterated, razed, and defaced, and the memory or record of them shall be reduced into oblivion and forgetfulness, as if no such grant had ever been made.

The 3d section limited the power of the Governor, to make future grants or demises, to the period of his own tenure of office. This applied to Nutten Island, the King's Farm, the King's Garden, the swamp, and Fresh Water, 'as they are now limited and bounded, being the demesnes of his Majesty's fort at New York, and for the benefit of his Majesty's Governors and Commanders-in-chief for the time being."

This section contained the following clause: "Saving to the city of New York the right they have to the Fresh Water, and lands to low water mark, behind the King's Garden."

The statute of the 17th of November, 1702, entitled "An Act for repealing several acts of Assembly, and declaring other ordinances, published as acts of Assembly, to be void," repealed this act of 1699. (See The People *vs.* Trinity Church, 22 N. Y. Rep., 44.)

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This repealing act was repealed or disaffirmed by Queen Anne, on the 26th of June, 1708, and the act of 1699 was affirmed by her. (Smith & Livingston, vol. i., p. 33. Colonial Documents, vol. v.)

These acts were reviewed in the case of The People *vs.* Trinity Church (22 N. Y. Rep., p. 44), and it was held, that a grant of the King's Farm, made in 1705, when the act of 1702 was in force, was valid.

On the 1st of November, 1733, an act was passed reciting the restriction upon the power of the Governor, contained in the third section of the act of 1699; reciting the boundaries of the Swamp and Fresh Water, as given in that act (*ante*, p. 138); that the said Swamp and Fresh Water were said in such act to be the *demesnes* (printed denizen) of his Majesty's fort at New York, &c.; reciting the saving clause of the right of the city of New York; and that the Swamp was a nuisance, for want of clearing and draining. The act then repeals "so much and no more of the clause, in the act aforesaid, as concerns the said Swamp; saving to all persons (except the Governor) their rights in the premises; *and particularly* to the Mayor, Aldermen, and Commonalty of the city of New York, the right they have to the Fresh Water, and likewise the magazine and powder-house adjoining to the same, and the *nowell* or hummock of land it stands on, together with free and perpetual egress and regress to and from the same, over the causey leading thereto."

The history of this act of 1699 is interesting. Apparently, it was the annulling of land patents by an act of the Legislature; yet it was treated as valid. Mr. Smith* says, that Lord Bellamont procured recommendatory instructions from the Lords Justices, for breaking these grants. Surveyor-General Colden, in his valuable paper

* History of New York, vol. i., p. 96.

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of 1732, of the state of lands in the province, speaking of some of these grants, says: "The governors were deceived as to the quantity in many cases, and the King in all. The governors were guilty of a notorious breach of trust, and the grantees were equally guilty with them, in deceiving the King, and defrauding honest settlers."

The Lords Justices referred to were the regents appointed by King William on his leaving the realm in June, 1698. They consisted of the Lord Chancellor, the Lord President, and others. (See Smollett's History, vol. i., 361–2, and note.)

Lord Campbell says, that King William, by virtue of his prerogative, appointed Lords Justices, who might be considered the successors of the Grand Justiciary in the times of the Norman kings, and of the early Plantagenets. (Lives of the Lord Chancellors, vol. iv., p. 127.)

On the 10th November, 1698, upon the report of the Lords of Trade, on Bellamont's representations, instructions and orders to take all methods, allowed by law, to break the grants, were issued. (Documents Colonial History, vol. iv., p. 411, &c.) When the act was transmitted, great difficulties arose as to confirming it. The Solicitor-General objected to it. The Lords of Trade, in 1703, stated they found great objections. It would be irregular to give judgment, as to the rights of private persons, without examining their titles. (Ibid., vol. iv., p. 853). Finally, but not until 1708, it was ratified by order of Council.

It appears also that the Council in New York was equally divided upon the question of passing the act of 1699. Bellamont voted first as a member, and then gave a casting vote. (Minutes of Council, 6th May, p. 622.)

On the 12th of August, 1731, an order in Council was made, empowering Governor Cosby to give a patent to Anthony Rutgers, for a certain swamp and fresh pond,

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called the Fresh Water, adjacent to the Duke's Farm, upon the Island Manhattan, now called New York Island, containing seventy acres. The description is the same as in the act of 1699.

I do not find any patent issued by Cosby, under this order in Council; but there is one from George II. direct, dated December 31, 1733, reciting certain acts of the Colonial Legislature, recently passed, declaring that no grant by the Governor, &c., of the above premises, should be valid for a longer time than the said Governor's time in office, &c., &c., and therefore the King grants the said premises himself. The description is the same.

It seems that the Corporation did not concede that they had no right to this property. By an ordinance of 1734, persons were forbidden to fish, in certain modes, "in the pond commonly called Fresh Water Pond, belonging to the Corporation." (Manual, 1860, p. 563; Minutes Common Council, 1734.)

On the 12th February, 1790, a committee was appointed to obtain surveys of the ancient bounds of the Fresh Water Pond.

The Committee reported a plan for regulating streets in the Swamp. On the 27th August, 1790, a Committee was appointed to confer with the representatives of Anthony Rutgers as to Fresh Water Pond.

On verbal report from the Recorder, the Board agreed to purchase the right of Rutgers' heirs to the pond, for £150; also to negotiate for a slip of meadow on the north-western side.

On the 29th of September, 1791, a release and conveyance was executed, by the heirs of Rutgers, to the Corporation, for the soil under water, known, &c.

In the Street Commissioner's office is a survey of the Fresh Water, made from measurements on the ice.

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The surveyors can locate the premises with reasonable certainty.

We see from this review that in the act of 1699, as well as in that of 1733, the rights of the Corporation to the pond are expressly reserved. As they got this right in 1686, and the only adverse claim of the Crown seems to have been the assertion that it was part of the demesnes of the Fort, and so reserved, (a claim, first put forward in this statute, as far as I have discovered,) the right of the Corporation seems the best. The price, also, of £150, to purchase the release from Bayard's heirs, appears very insignificant for anything like a plausible title. It deserves great consideration, also, that, while Dongan's charter excepts the swamp near the King's Farm, it does not except the pond.

The Swamp.

But the Corporation never seems to have questioned the title of Rutgers to the swamp proper, conveyed by the same patent as the pond. And I think it was because it was excepted in the Dongan's charter, under the name of the swamp near the King's Farm.

For some remarks on the lines and boundaries of this parcel, see Appendix, No. 57.

IV. THE VACANT UNAPPROPRIATED OR COMMON LANDS.

The apostile of the Director General and Council, of the 20th January, 1658, granted to the Burgomasters the unconceded lots within the city walls.

If this was inoperative, as I apprehend it clearly was not, then the terms of the Dongan grant are amply sufficient to comprise all such land within or without the walls. The Cingell (line of Wall street) was built in 1653.

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The language of the 3d section of the Dongan charter is as follows: "I do also give and grant to the said Mayor, Aldermen, and Commonalty of the said city of New York, all the waste, vacant, unpatented, and unappropriated lands lying and being within the said city of New York, and on Manhattan's Island aforesaid, extending and reaching to the low water mark in, by, and through all parts of the said city of New York and Manhattan's Island aforesaid, together with all rivers, rivulets, coves, creeks, ponds, waters, and water courses in the said city and island, or either of them, not heretofore given or granted by any of the former Governors, Lieutenants, or Commanders-in-Chief, under their or some of their hands and seals, or seal of the Province, or by any of the former Mayors, or Deputy Mayors, and Aldermen of the said city of New York, to some respective person or persons, late inhabitants of the said city of New York, or Manhattan's Island, or of other parts of the said Province."

The clause of Montgomery's charter (37th section) grants "all the waste, vacant, unpatented, and unappropriated land lying and being within the said city of New York, and on Manhattan's Island aforesaid, extending to low water mark; . . . and all rivers, rivulets, creeks, coves, ponds, waters, water-courses, &c., within the city of New York and Manhattan's Island."

The exceptions were: "Our Fort George, in the city of New York, and the ground, full boundaries, and extent thereof, or thereto belonging, and the land called the King's Farm, with the swamp next the same."

It is to be recollected, what, I believe, has never been disputed, that Montgomery's charter cannot be more than a confirmation of Dongan's, where the rights or property granted are the same. It must not be considered as the original source of title or right in those particulars.

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The doctrine of the common law, that the king was the ultimate source of title to all the lands of the kingdom, and that, therefore, the right to all vacant and unpatented land was in him, has been recognized in this country.*

The authority of the Royal Governors to convey the whole title of the crown has been also fully admitted.†

The crown, in 1674-5, had concentered in itself the Indian title to possession, and the Dutch sovereignty; and the Governor, Dongan, transferred the whole, in fee, to the Corporation, as to all the land on the island not patented or appropriated.

In the exchange deed of 1768, between the Corporation and George Janeway (Comptroller's office), a map of common lands is referred to. A compilation was made by Gerard Bancker, City Surveyor, in March, 1773, from surveys by Marschalk. A copy has been made by Mr. Serrell, City Surveyor, and is to be found in the Comptroller's office.

In 1796, a map of the common lands was made under the direction of the Common Council, which is to be found in the Street Commissioner's office.

It is printed in Valentine's Manual for 1861, from Twenty-third street up to the Harlaem line.

From these sources, and from the grants of the Corporation after 1686, found in the records and maps in the Street Commissioner's office, it would be quite practicable, to make nearly perfect maps and statements of all the land acquired by the Corporation under the charter of 1686, or

* Rogers *vs.* Jones, 1 Wendell, 237; Whitney *vs.* The Mayor of New York, &c., Court of Appeals, 1849; The People *vs.* Livingston, Judge Wright's Opinion; Smith *vs.* Lansing, 4 Wendell, 236; Johnson *vs.* McIntosh, 8 Wheaton, 543; Waddell *vs.* Martin's Lessees, 16 Peters.

† See authorities, in preceding note; also, Bogardus *vs.* Trinity Church, 1 Sandf. Ch. Rep., 636; Arredondo case, 6 Peters' Rep.; Pea Patch case, Wallace's Reports, *passim;* The People *vs.* Trinity Church, 22 N.Y. Rep., 44.

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ratified to it as acquired below the wall under the Dutch apostile. (See further, upon this subject, Appendix, Note 57.)

On the 10th of November, 1834, a report of the Finance Committee was made to the Board of Aldermen, upon the subject of the adjustment of the boundaries of the common lands. The Committee refer to a report made the 8th of July, 1833, and recapitulate the main facts contained in that and other documents.

They advert to the map of 1796, and proceed to state—"That according to that survey the Corporation had proceeded to sell and lease various lots described as being bounded on those streets; that in 1807 an act was passed, appointing Commissioners to lay out the whole island, north of a certain point, into streets, avenues and public places—that such Commissioners did not adopt the streets as laid out in the survey of 1796, but projected entirely a new plan, in which, although the cross streets are generally very near or overlapping the lines of the old streets, gores or strips of land, of more or less width, were created between the lines of the old and new streets; and in some instances those gores are of considerable extent, from the fact that fifteen of the streets, so laid out by the Commissioners, are one hundred feet wide. The effect of this has been, to cut off and appropriate for streets part of one side of a lot, and to throw between the other side of the same lot and the new street a strip of land, intended as part of a street by the old survey of 1796; thus abridging the dimensions of the lot on the one side, and depriving it of its front on the other." The report then states that the several purchasers refer to the deeds and map of 1796, as containing a warranty, on the part of the Corporation, that his lot was to have the benefit of fronting upon streets, on each side; that it cannot be denied that the purchasers

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were entitled to require a settlement of their boundary lines, and a fulfillment of their claims in respect to fronting on streets, so as to place them in as good a situation, at least, as they would have been if the streets laid out in the survey of 1796 had not been abolished. In considering how this is to be effected, the Committee assume:

1st. That every purchaser has a right to as much land as his deed purports to give him.

2d. That he is entitled to as much front on the street as he would have had according to the description in his deed, and that such front should be of equal width with that to which his deed refers. They state a difficulty in the application of their principles, and they suggest that in all cases where the settlement of the boundary line of a lot or piece of land must necessarily (in order to give fronts) increase the quantity of land to be owned by the purchaser, such increase or addition should be paid for, not, however, as land fronting on a street (because the right of the purchaser under his deed to fronts requires that he get them without further consideration), but as middle or rear land.

The report then noticed another difficulty arising from the streets on the survey of 1796, never exceeding sixty feet in width, while some of those under the map of 1807 were one hundred feet wide; that owners, who by any adjustment would acquire a front on a street of one hundred feet, ought to pay for the difference in value.

The Committee reported a resolution, referring it to the Finance Committee to adjust the boundaries, in each particular case, upon agreement with the owners; and, if they could not agree, to appoint arbitrators by consent, with authority to appoint an umpire.

And in May, 1836, an act was passed for settling the boundaries of certain pieces of land, called the common

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land lots in the city of New York. The Governor was to nominate, and, with consent of the Senate, appoint three Commissioners, to determine, upon principles of justice and equity, all matters in difference between the Mayor, &c., of the city of New York, and all parties respectively who may be the owners of portions of the common lands formerly belonging to the said Mayor, Aldermen, and Commonalty, and sold by them previous to the 1st of April, 1811, and who may consent and agree to abide by such determination relative to the adjustment of the boundary lines of any such piece or pieces of land, so as to make the said lines conform with the streets and avenues and public places of the said city, as established by law.

By the second section, the Commissioners had the power, in all cases submitted to them, to determine whether any and what pieces or gores of land shall be conveyed by the Mayor, &c., to any of the said parties, or by any of the said parties to the Mayor, &c., whether any and what exchanges of land should be made, and upon what terms; and whether any moneys should be paid to or by the said Mayor, &c.

The third section related to the production of maps, &c., and the compensation of the Commissioners (Session Laws, 1836, chap. 244; Davies, p. 785).

It will be noticed that the map of the common lands, made in 1796, carries them up to the Harlaem line. There are none beyond it.

By patents granted by Nicholls, in 1666, certain common lands were granted to the freeholders and inhabitants of Harlaem. The boundaries of the town are declared (18th May, 1666, Lib. 1, p. 42). The grant is of the privileges of a town, "but immediately depending on this city, as being within the liberties thereof."

By an act of the Assembly, of March 24, 1772, the lines

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of division between the city of New York and the township of Harlaem, so far as concerned the right of soil in controversy, were settled and established (Van Schaick, Ed. Laws).

By a statute of March 28, 1820, it was recited, that these common lands of Harlaem were waste, and unproductive, and liable to be sold under assessments of the Corporation of the city of New York for opening the avenues of the said city. The act appointed trustees for making sales, and applying the proceeds.

The petition for the charter of 1686 sets forth, that all the inhabitants on the Island Manhattan were under the government of the city of New York.

In the description of the boundaries of the wards of 1683, the Out Ward contains the town of Harlaem (See note 16).

TITLE ACQUIRED UNDER PARTICULAR STATUTES.

1. *Under the Common School Acts, &c.*

By the 7th section of the act of April 11th, 1842, entitled "An act to extend to the city and county of New York the provisions of the general act in relation to Common Schools," the Commissioners and Inspectors named therein were, in certain cases, to procure a school-house, and all things necessary to organize a school in the district; and the title to all lands purchased by virtue of this act, with the buildings thereon; "shall be vested in the city and county of New York." This does not seem a very intelligible description of a body.

That act, and various other acts, so far as inconsistent with, or repugnant to, the provisions of the act of July 3, 1851, were repealed by the latter act.

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The act of July 3, 1851 (Sess. Laws, 1851, c. 386; Davies, 1040), "to amend and consolidate into one act the various acts relative to the Common Schools of the city of New York," provides, in the 9th section, that the Board of Education was to provide such additional sites and buildings as may be necessary for the purposes of the act, the title to which shall, in all cases, be vested in the Mayor, Aldermen, and Commonalty of the city of New York.

And by section 25, the title to all property, real and personal, purchased with the moneys derived from the distribution or apportionment of the school moneys, or raised by taxation in the city of New York, shall be vested in the Mayor, Aldermen, and Commonalty of said city.

By an act of June 4, 1853, entitled "An act relative to Common Schools in the city of New York" (Sess. Laws, 1853, c. 301), it was enacted that the Public School Society of the city of New York shall, on or before the 1st of September, 1853, convey and transfer, according to this act, by deed, to be approved by the Counsel of the Corporation of the city, all their corporate property to the Mayor, Aldermen, and Commonalty of the city of New York, subject to all the liens and incumbrances thereon, and the debts of said society; and thereupon the said property shall belong to the said Mayor, Aldermen, and Commonalty in the same manner as the school property, now used and occupied by the Ward Schools, belongs to the said Mayor, Aldermen, and Commonalty; but such portions of the property aforesaid as have been granted to the Public School Society, subject to the trust that the same shall be devoted to the purposes of Public Schools, shall be held subject to such trust; and the premises now known as Trustees' Hall, situated at the corner of Grand and Elm streets, shall be used and occupied by the Board

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of Education, as long as they may think advisable, for the meetings and business thereof; and the residue of the property aforesaid shall be conveyed, for the purposes of Common Schools, in the same manner as the property purchased by the authority of the Board of Education for the purposes aforesaid.

By section 6, as soon as the said Public School Society shall have conveyed all their corporate property, and made and filed certain statements, &c., provided for in previous sections of the act, the corporate powers and existence of the said Public School Society shall cease, and their schools be merged in the system of public instruction provided by the act, entitled "An act to amend, consolidate, and reduce into one act," &c., passed July 3, 1851, so as to be and remain an integral portion thereof.

By the 14th section, the 25th section of the act of 1851, before cited, was amended. The amendments are not essential to be noticed here. The title was still to vest in the Corporation.

In the statement published by the Comptroller in 1860, of the real estate of the Corporation, will be found a list of various parcels of property, transferred by the Public School Society under this act.

2. *Lands sold for Taxes or Assessments.*

By the act of April 18, 1843, it is enacted that it shall be lawful for the Comptroller of the city, at any sale of lands for taxes in the said city, and for the Street Commissioner, at any sale of lands for assessments in the said city, held pursuant to law, to bid in, for the Mayor, Aldermen, and Commonalty of the said city, every lot of land and premises by them put up, for which no person shall offer to bid.

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Certificates are to be issued, and leases given in the same form and with the same effect, as in the cases of leases to individuals, as now authorized by law.

The act contains other provisions as to the time and mode of redeeming, and as to the rights of mortgagees and lessees. (Sess. Laws, 1843, ch. 235; Davies, 873.)

3. *Under Police Acts.*

By the act of May 13, 1846, § 4, it is provided that each ward of the city of New York shall be a patrol district. The Corporation shall provide, in each patrol district, suitable accommodation for the patrol of such district, to be designated "Police Station-house." (Sess. Laws, 1846, ch. 302; Davies, 916.)

Section 2 of the act of 1853 (ch. 228), has the same provision. (Davies, 1114.)

It will be seen, by reference to the printed statement of the Comptroller, of 1860, that several parcels of property have been purchased by the Corporation for the use of the police since 1846.

4. *Court-house.*

The act of the 17th of April, 1860, authorized the Comptroller and other officers to locate and erect in the city of New York a suitable building for a court-house and place of detention for prisoners brought to the police court; the ground and buildings to be the property of the city of New York.

They could select the ground from land of the Corporation, or purchase a site, in their discretion. (Sess. Laws, ch. 505.)

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SECTION V.

TITLE TO PARTICULAR PARCELS.

1. *Parks, Squares, &c.—Duane street Park.*

This space or parcel of ground was part of the property of Trinity church, acquired under the ground brief of the Dominies Bowerie, and the Letters Patent of 1705. (See Appendix, No. 57.)

On the 20th of June, 1797, Trinity church made a conveyance to the Corporation of that parcel of ground.

Madison Square.

By an act of the Legislature, of April 10, 1837, entitled "An act to alter the map or plan of the city of New York, by establishing a public square or place in the Sixteenth Ward of said city," it was enacted, "that all that piece of land in the Sixteenth Ward of the city of New York, bounded northerly by Twenty-sixth street, westerly by the Fifth avenue, southerly by Twenty-third street, and easterly by a certain street established by law (Madison avenue), being seventy-five feet wide, and lying between the Fourth and Fifth avenues, is hereby declared, and shall be hereafter known on the map or plan of the said city as a public square, or place, in like manner, and with the like effect, as if the same had been laid out by the Commissioners appointed in and by the act, entitled 'An act relative to improvements, touching the laying out of streets and roads in the city of New York, and for other purposes,'" passed April 3, 1807.

This act gave power to the Commissioners therein named to lay out streets, roads, and public squares. The ninth section prescribed the mode of doing this. On the confirmation of the Commissioners' report, the Mayor,

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Aldermen, and Commonalty were to become seized, in fee, of the lands, tenements, and hereditaments taken, in trust, nevertheless, that the same be kept open for a street or public square forever.

In 1847, proceedings were taken under this act, Commissioners appointed, and a report made and confirmed.

The square included a piece of ground formerly known as the burying-ground, (Goerck's Map of the Common Lands, 1796,) and afterwards as the House of Refuge.

By an act of the 27th of April, 1847 (Sess. Laws, 1847, chap. 138), it was made lawful for the Commissioners of Estimate and Assessment, in the matter of opening Madison square, to make their estimate and assessment in relation only to the land lying within the limits of said square that shall belong to individuals; and in consideration of the Corporation of the city of New York appropriating the residue of the land within such square belonging to them, without compensation therefor, it should be lawful for the Mayor, Aldermen, and Commonalty of said city to use all the land lying within the limits of said square, when opened, for the erection of public buildings thereon, and for other public purposes.

Madison Park.

The triangular piece of ground, bounded northerly by Twenty-fifth street, easterly by Fifth avenue, and westerly by the easterly line of Broadway, was declared not to be a part of one of the streets of the city, but should thereafter be a public place or park, in like manner as if the same had been laid out by the Commissioners, under the act of 1807. (Laws of 1847, ch. 439).

Stuyvesant Square.

By an act of the 18th of May, 1836 (Sess. Laws, 1836, chap. 361), it was provided, that that part of Sixteenth

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street, between the south-easterly line of the Second avenue, and a line drawn parallel to and 190 feet distant south-easterly therefrom, and all that part of Sixteenth street lying between the north-westerly line of the Second avenue and a line drawn parallel thereto, and 190 feet distant north-westerly therefrom, should be discontinued on the map or plan of the city. (§ 1.)

By the second section of the same act, all the land in the Sixteenth Ward, bounded north-easterly by Seventeenth street, north-easterly by the Second avenue, south-westerly by Fifteenth street, and south-easterly by a line drawn parallel to and distant 190 feet south-easterly from the south-easterly line of the Second avenue; also bounded north-easterly by Seventeeth street, south-easterly by the Second avenue, south-westerly by Fifteenth street, and north-westerly by a line parallel to and distant 190 feet north-westerly from, the north-westerly line of the Second avenue, was declared to be a public square, to be called Stuyvesant square, and the same was to be thereafter known as such public square on the map or plan of the said city.

Spaces of 30 feet in width were to be laid out on such map, and opened for public use as ways, from Fifteenth to Sixteenth street, and from Sixteenth to Seventeenth street, along the south-easterly and north-westerly sides of such public square. By the fourth section, the act was not to take effect until the land to be contained within the limits of the public square should have been ceded, by the owner or owners, to the Mayor, Aldermen, and Commonalty of the city of New York.

Stuyvesant Park.

A triangular piece of ground, lying between the Third avenue, the Bowery, and Seventh street, was part of the

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original property of Governor Stuyvesant, under the ground briefs to him. It descended to Nicholas W. Stuyvesant.

On the 1st of August, 1825, Nicholas W. Stuyvesant conveyed part of this parcel to Charles H. Hall and Robert L. Reade, to hold to the parties of the second part, their heirs and assigns, to their own proper use and behoof forever, in trust, nevertheless to permit the said Nicholas W. Stuyvesant, his heirs and assigns, in the mean time, and until the said granted parcel of ground should be opened as a public square, to receive the rents, issues and profits; and after the parties of the second part, their heirs and assigns, should have elected to lay open, and should have actually opened the same as a public square, then, upon the further trust, that the same be forever thereafter kept open and appropriated to and for the sole use of a public square or street, to be called Stuyvesant square, and to and for no other use or purpose whatever. Provided that, if such piece of ground should not, within thirty years from the date of the deed, be so opened and appropriated as and for a public square as aforesaid, then the presents should cease and determine, and the estate should revert to the said Nicholas W. Stuyvesant, his heirs and assigns, to their own proper use forever.

In 1828, Reade, one of the trustees, conveyed all his estate in the premises to James Hooker. In December, 1828, Hooker conveyed to Charles H. Hall, the other grantee; and in the same month Hall conveyed the premises to the Corporation of New York, "as and for a public or open square, or place."

On the 16th March, 1850, an act of the Legislature was passed, by which all that piece or parcel of land lying in the Seventeenth Ward of the city of New York, bounded on the northerly side thereof by Seventh street,

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on the westerly side thereof by the Fourth avenue, formerly the Bowery, on the southerly side thereof by Sixth street, and on the easterly side thereof by the Third avenue, was declared to be a public place in like manner as if the same had been laid out by the Commissioners appointed by the act of the Legislature, entitled "An act relative to improvements touching the laying out of streets and roads in the city of New York, and for other purposes," passed April 3, 1807.

"Such public place shall be known by the name of Stuyvesant square."

Stuyvesant had, before his deed to Hall, conveyed to a third person a strip of the parcel described in the act aforesaid. The Corporation caused proceedings to be instituted under the act of 1807. Damages were assessed to such owners and paid by the city, and the final order of confirmation was made on the 31st July, 1852.

On a question arising between the heirs of Stuyvesant and the Corporation, it was held, that by the effect of the deed the legal fee was in Hall and Reade, but was to revert to Stuyvesant if the square was not opened in thirty years.

If it was opened within that period, and from the time of the opening, the legal fee was to remain in the grantees, their heirs or assigns, forever, in trust for the public use of the land as a square.

There was no dedication of the land as a square. It was to revert, if it was not opened, and to revert in fee to the grantor's use. There was no duty to open it, either towards Stuyvesant or the public; no trust for that purpose. If the grantees did a certain act in *pais*, an estate was thereupon to arise in trust for the public use. It was a conditional limitation. The event which the parties had in contemplation had occurred. The one party could

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transfer the interest and right to fulfill the conditional limitation to the other, and that one to the Corporation. The latter acquired the right to open the square, and rightfully proceeded within the thirty years to exercise it. (The Mayor, &c., of New York, *vs.* Stuyvesant, 17 N. Y. Rep., 34.)

Thus stands the title to this piece of property.

Tompkins Square.

By an act of April 9, 1833 (Sess. Laws, 1833, ch. 130), it was enacted, that all the land in the Eleventh Ward of the city of New York, bounded northerly by Tenth street, easterly by avenue A, southerly by Seventh street, and westerly by avenue B, was laid out, and should be thereafter known, on the map or plan of the city, as a public square or place, by such name or designation as the Common Council might direct; and the said public square or place might be opened as such, according to law, in like manner as if the same had been laid out by the Commissioners appointed in and by the act entitled, &c., passed April 3, 1807.

Proceedings were taken before the Supreme Court, in March, 1834, to open the square under the act of 1813, and a report of Commissioners was confirmed.

The Common Council have designated the parcel Tompkins square.

Union Place.

The original square, as laid out on the map of 1807, by the Commissioners, was altered and reduced by the act of April 11th, 1815. (Sess. Laws, 1815, ch. 181; Davies, 581.)

Then, by an act of April 23, 1831 (Sess. Laws, 1831,

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ch. 252 ; Davies, 732), it was declared that all the lands in the city of New York, lying between the Bowery road, the Bloomingdale road, and Fifteenth street; also lying between Fourteenth street, Fifteenth street, the Bowery road, and the Bloomingdale road; also those parts of the Fourth avenue, as the same is laid out by the act, entitled "An act making certain alterations in the map or plan of the city of New York," passed April 11, 1815, which lies south-westerly of Fourteenth street and Thirteenth street, and easterly of the Bloomingdale road; and also all the land lying between the north-westerly line or side of the Fourth avenue and the Bloomingdale road, shall be deemed to be parts of a public place, called Union place, for the purpose of being opened as such public place according to law.

By a further act, of April 5, 1832, the place was altered and enlarged so as to include some other premises. (Sess. Laws, 1832, ch. 89 ; Davies, 736.)

In April, 1833, the usual proceedings were taken under the act of 1813, in the Supreme Court, the assessments, &c., made and confirmed, and the title vested in the Corporation, as is provided in the 178th section of such act.

Abingdon Park.

In 1831, proceedings were taken in the Supreme Court for extending the Eighth avenue, and other purposes. Under these, this Park was made public.

Mission Park.

In 1833, proceedings were taken in the Supreme Court for the widening of Anthony street, and other purposes, and this Park made public.

Park on Grove Street.

This strip was designated as a public place on the map of 1807.

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On the 28th of January, 1836, an ordinance was adopted by the Common Council, that this be opened as a public place; and the Counsel was directed to take the necessary measures. In April, 1837, the report was confirmed.

Manhattan Square.

This square, between Seventy-seventh and Eighty-first streets and the Eighth and Ninth avenues, was laid out by the Commissioners under the act of 1807 (ch. 115). In 1840, proceedings were taken in the Supreme Court, Commissioners appointed, and an assessment and report made, and confirmed in June, 1840. Under this proceeding the title has become vested under the provisions of that act, and the act of 1813.

Mount Morris Square.

This square was established under an act of May 10th, 1836, which discontinued a square called Harlem square, on the map of 1807. It comprises ground between One Hundred and Nineteenth and One Hundred and Twenty-fourth streets, lying 425 feet east of Sixth avenue; 890 feet on north and south sides, and 987 feet on the east and west sides. A part of the Fifth avenue was discontinued from One Hundred and Twentieth to One Hundred and Twenty-fourth streets. It was to be a public place, as if it had been originally laid out on the map of 1807.

In 1839, the usual proceedings were taken in the Supreme Court, and in November the report was confirmed.

Washington Square. (See note 24.)

Reservoir Square and Distributing Reservoir.

This parcel of property, between Fortieth and Forty-second streets and the Fifth and Sixth avenues, consisted

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of the common land held under the charter by the Corporation, except one parcel, for which a conveyance was received from William Wright, dated the 11th May, 1847. (Lib. 488, p. 479.)

This was acquired under the authority of the act of 1834 (chap. 256). See *post*, this Section, Tit., "Croton Aqueduct."

Central Park and Receiving Reservoirs.

The act for supplying the city of New York with pure and wholesome water, passed the 2d May, 1834 (Sess. Laws, 1834, ch. 256), gave authority to the Commissioners to treat with owners for any land which might be required, subject to ratification by the Common Council; and, in case of disagreement, the Commissioners were to examine and report the amount of compensation. Upon payment of such amount, "the Mayor, Aldermen, and Commonalty shall become seized in fee of such property so required, and shall be discharged of all claim by reason of any such damage."

By an act of April 11, 1849 (Sess. Laws, 1849, ch. 383), a Croton Aqueduct Board was created, with full powers over the property then acquired for the purposes under previous acts.

By an act of June 30th, 1853 (ch. 501), the Croton Aqueduct Board was authorized, for and in behalf and in the name of the Mayor, Aldermen, and Commonalty of New York, to acquire title to the lands, &c., lying between Eighty-sixth and Ninety-sixth streets and the Fifth and Seventh avenues, or so much thereof as they might deem advisable, for the construction of a new reservoir, under the authority of the Common Council.

By various sections, provision was made for the appointment of Commissioners to ascertain the compensation to

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be made for lands, &c., taken; upon confirmation of the report, "the Mayor, Aldermen, and Commonalty shall become and be seized in fee of all the lands, tenements, and hereditaments mentioned in the report, that shall or may be required for the purpose of the new reservoir aforesaid; in trust, nevertheless, that the same be appropriated as and for a reservoir of the Croton Aqueduct; and thereupon the said Mayor, Aldermen, and Commonalty, and the Croton Aqueduct Board, or any person or persons acting under their authority, may take possession of the same, or any part or parts thereof, without any suit or proceeding at law for that purpose."

By an act of July 21st, 1853 (Sess. Laws, 1853, ch. 616), all that parcel of ground between Fifty-ninth and One Hundred and Sixth streets, and the Fifth and Eighth avenues, was declared to be a public place in like manner as if the same had been laid out by the Commissioners under the act of April 3d, 1807, and the map or plan of the city was declared to be altered accordingly.

The Mayor, &c., were authorized to take the land for public use as a public square, pursuant to the provisions of the act of 1813.

Proceedings were taken in the Supreme Court, under this act, and an order of confirmation made on the 5th of February, 1856, for lands taken for the Central Park.

By an act of April 17, 1857 (Sess. Laws, chap. 771), so much of the parcel bounded southerly by Fifty-ninth street, easterly by the Fifth avenue, northerly by One Hundred and Sixth street, and westerly by the Eighth avenue, as had been taken for a public square, confirmed by order of the Supreme Court of the 5th of February, 1856, should be known and entitled as The Central Park, excepting out of said Central Park the land belonging to the State of New York, and occupied by and connected with the

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Arsenal, unless the city of New York shall acquire title thereto.

By section 2, the Park was placed under the exclusive control and management of a Board of Commissioners, to consist of eleven persons, who should be named and styled "The Commissioners of the Central Park."

The 13th section provides for an exchange of lands with the Croton Aqueduct Board, within the above boundaries.

On the 14th of April, 1856, the Supreme Court confirmed the report of Commissioners for taking Lands, for lands taken for the new Reservoir.

And by a further act of April 2d, 1859 (Sess. Laws, ch. 101), the parcel of ground bounded southerly by the southerly side of One Hundred and Sixth street, northerly by One Hundred and Tenth street, easterly by the Fifth avenue, and westerly by the Eighth avenue, was declared to be a public place in like manner as if the same had been laid out by the Commissioners, under the act of 1807.

The Board of Commissioners of the Central Park, for and in behalf of the Mayor, Aldermen, and Commonalty of the city of New York, were authorized to acquire title to such parcel of land, for public use as for a public square, pursuant to the act of 1813, and the amendatory acts thereto. Commissioners for appraisal were to be appointed. And by section 13, the said public place, when taken, shall, with the parcel of land mentioned in the 1st section of the act entitled "An act for the regulation and government of the Central Park, in the city of New York," passed April 17th, 1857, form and be the Central Park, and shall be subject, as to its laying out, control, and management, to all the provisions of the last-mentioned act, and any acts amendatory thereof; and shall be under the exclusive control of the Board of Commissioners created thereby.

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Blackwell's Island.

Petrus Stuyvesant granted the island known as Verchen's or Hogge's Island, to François Flyn, by ground brief of 20th September, 1651, in the Sound or East River, near unto Hell-gate. He gave also another parcel of 50 acres, over and against said land, by ground brief of 20th February, 1656, to said Flyn.

On the 3d of February, 1667, a patent was granted for these parcels to George Manning, by Governor Nicolls. It recited, that they stood forfeited to his Majesty's Government, by an act of the Government dated 10th October, 1665, as belonging to a subject of the States General, then at war and open hostility against his Majesty.

There was an entail or settlement of this property made the 1st August, 1668, between John Manning and Mathias Nicholls. Smith speaks of it as Manning Island. (History of New York, vol. i., p. 187.) Prior to the 29th of August, 1779, the property became vested in Jacob Blackwell. (Lib. 21, p. 80, Albany.) He devised it to James Blackwell. The latter conveyed to Joseph Bell, and got back the property on a foreclosure. On the 19th July, 1828, James Blackwell conveyed the premises to the Mayor, Aldermen, &c., with warranty, for the sum of $32,500. (Lib. 239, p. 287)

In September, 1844, Magdalena Bell released all her title, as doweress, to the Corporation. (Lib. 451, pp. 403, 405.)

For the details of her claim, see 10 Paige's Reports, p. 49.

Randall's Island and Sunken Meadow.

By a deed of April 8, 1835, David Randall and others conveyed to the Corporation this parcel of ground in consideration of $60,000 (Lib. 327, p. 537). It contains about

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150 acres, and was the property of Thomas Randall, of whom the grantors were executors or trustees. A map is annexed to the deed.

This island was known as Great Barn Island.

Ward's Island.

By a series of conveyances in 1851 and 1852, various parcels on this island were conveyed to the Corporation. See Deeds, Lib. 606, pp. 365, 370 and 371, and the map annexed to the Comptroller's Report of 1860.

A map is annexed to the first deed. The grantors were Abraham R. Lawrence and others.

This island was known as Little Barn Island in Montgomery's Charter (see section 2), and in the Description of the Boundaries of the County of New York, in the act of 1830 (3 R. S., p. 2).

The Alms-house.

By Montgomery's charter (§ 23), the Mayor, &c., and their successors were granted power to build, erect, or appropriate any of their buildings already built, for an Alms-house for relief of the poor.

On the 20th of January, 1794, a petition was presented to the Legislature for leave to raise £10,000, by lottery, to construct a new building for an Alms-house.

On the 6th of April, 1795, an act of the Legislature was passed, authorizing such lottery for the purpose of raising the aforesaid sum.*

In the year 1814, the Corporation established the Alms-house, at Bellevue, upon their own ground.

In the year 1818, it was deemed expedient to enlarge the establishment, and for that purpose an act of the Leg-

* 3 Greenleaf, 216.

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islature was obtained, passed on the 21st of April of that year, authorizing the Corporation to take possession of lands contiguous to their property, as described in the act, upon paying the value thereof, to be assessed in the same manner as was directed in the previous act, passed March 29, 1816. It was provided that, upon payment of the amount so assessed, the Corporation should become seized of the property taken in fee simple absolute.

A report was accordingly made, settling the amount to be paid, and was received by the owner. The Corporation took possession of the property, and continued to use it for an Alms-house, until 1845, when the establishment was removed to Blackwell's Island, and the lands were sold by the Corporation.

In the year 1850, an action was brought by the representatives of the owner, claiming the moneys received by the Corporation on such sale.

This case is reported in Barbour's Reports, vol. viii., p. 486, in the Supreme Court (Heyward *vs.* The Mayor of New York), and in 3 Selden, p. 814, on Appeal. It was insisted that the property had not been taken for public use, and therefore the act of 1818 was unconstitutional.

The Court fully admit the doctrine that property could not be taken for any purpose plainly of a private nature. But they held that the purpose intended was of a public nature.

A point was raised under the preamble of the act of 1816, which it is needless here to notice.

But the most important question in the case was, whether the land having been taken for a specific public use, and that use abandoned, the property did not revert to the owner. The Court examined this question carefully, and conclude that there was no such condition to be implied from the statute or the proceedings under it. The title

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vested absolutely; a full consideration for its value at the time it was given. The growth of the city and necessity of the case compelled a change of location, and if the Corporation had obtained property through the instrumentality of the State, in a proper case, in good faith, there could be no good reason why a new location should not be paid for, by the sale of that which had been abandoned.

The Bowling Green.

This was a vacant place in front of the fort. In 1732 it was leased to John Chambers, Peter Bayard, and Peter Jay, who applied to enclose it and improve it for a bowling green. The lease was for eleven years.

The title is now solely in the Corporation, under, as I think, the apostile of 1654; certainly under the charter of 1686.

The Croton Aqueduct.

It is not proposed, in this part of the present work, to state the system of the organization or mode of action of the authorities connected with this great subject; what is pertinent relates only to the character of the title to the property occupied by the aqueduct.

The act of the 2d of May, 1834 (Session Laws, p. 451, chap. 256), was the first of a series of statutes upon this subject. The 12th, 13th, 14th, and 15th sections relate to the acquisition of the property. After providing for the mode of ascertaining the compensation, the 14th section provides, that the commissioners shall, within two months, pay to the owner the sum mentioned, in full compensation for the property required, or for the damage sustained; and thereupon the said Mayor, Aldermen, and Commonalty, shall become seized in fee of such property, so required,

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and shall be discharged from all claim by reason of such damage.

By the 15th section, the commissioners shall have a right to use the ground or soil under any street, pathway, or road within the State, for the purpose of introducing water into the city of New York, on condition that they shall cause the surface of such street, highway, or road, to be restored to its original state; and all damages done thereto to be repaired.

By the act of the 25th May, 1836 (Session Laws, p. 709), amending the prior act, it was provided (§1), that lands in the county of Westchester, which might be taken by the Corporation, by virtue of the act amended, should be held and appropriated by the Corporation only for the use and purpose of introducing water into the city of New York, and for no other uses or purposes whatsoever.

In case the Corporation used land which had been taken for any other purpose, or the land should not be required for the purpose of introducing water into the city, the same shall become revested in the individual from whom it was taken, upon repayment of the original amount paid, deducting any damage sustained by the owner.

By the 3d section, the Corporation was to erect and sustain fences which might be required to protect the works from injury.

And by the 4th section, the Corporation was to erect and sustain convenient passes across or under the aqueduct, to be erected whenever such aqueduct shall intersect the land in the county of Westchester, belonging to an individual or individuals, for the farming, or other purposes, of the land thus intersected.

In the report of the Croton Aqueduct Department, of December 31, 1851 (Doc. Board of Aldermen, 81), it was stated "that it had at all times been difficult to convince

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most of the owners that, in selling and conveying their lands to the city, they parted with anything more than a right of way under ground; and that the surface, for all purposes of agriculture, and every kindred purpose, remained to them as perfectly as before the execution of their deeds of conveyance."

An action to test the title was commenced, and is stated in the report. The Corporation erected a fence on the ground taken for the aqueduct, to protect it from injury; it was thrown down by the adjoining owner, and trespass brought by the city.

Judge McCoun charged the jury in favor of the defendant, and a verdict in his favor was found.

Exceptions were argued before the General Term, and the charge held erroneous, and a new trial ordered.

Judge Barculo, in delivering the opinion of the Court, stated that the following propositions seemed quite clear:

1st. "The plaintiffs have a right to fence any part of the aqueduct in their discretion, and their acts are conclusive as to the propriety of so doing. This right does not depend upon the statute requiring it to be done at their expense, but existed prior to that statute.

2d. "'The right is subject to the duty of erecting and sustaining convenient passes across or under the aqueduct, wherever it intersects land belonging to an individual, for the farming and other purposes of the land.'—Sec. 4 of the Act of 1836, Laws of 1836, p. 709.

3d. "The defendant, not owning both sides of the aqueduct, his land is not intended within the meaning of the act, and he is not entitled to any passes across, or under, the aqueduct, by virtue thereof.

4th. "The defendant's right of crossing the *locus in quo* must depend upon the common law doctrine in regard to ways of necessity, and must be sustained by proof that he

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has no other reasonable mode of passing to the public highway.

5th. "If there is a highway laid out and opened, as appears by the map, contiguous to the south side of the defendant's lot, he has no right to cross where the fence was erected, and is a trespasser in so doing.

6th. "Even if it be conceded, that the defendant had a right to cross the aqueduct, he was not justified in removing the whole line of the fence for that purpose.

7th. "The judge at the Circuit entertained incorrect views of the law, and submitted the case erroneously to the jury.

8th. "The judge erred in charging the jury that it was for them to consider whether the order to fence was based on an honest judgment of its necessity to protect the aqueduct from injury.

9th. "The erroneous charge has probably produced an erroneous verdict, and a new trial should therefore be granted."

The cause was again tried in July last, at the Westchester Circuit, before Barculo, Justice; and under the law governing the case, as above settled by the Supreme Court, the jury found a verdict for the plaintiffs, for nominal damages only—no more being asked for—as the trespass involved the title to land, and these would carry costs.

The report continues: "In this verdict the defendant has acquiesced; and the perfect and entire control of the city over these lands, for all purposes necessary to protect the aqueduct and its appendages from injury, being thus established, this department is relieved from all the doubt and uncertainty which have hitherto modified its action, and may hereafter proceed with confidence in the discharge of its duties. These require that all trees and shrubbery, standing upon the aqueduct ground, the roots of which,

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by any possibility, might penetrate the structure itself, should be removed or cut down."

By the act of June 30, 1853 (chap. 501), entitled "An act to facilitate the acquisition of lands for a new reservoir in the city of New York," it was provided that the Croton Aqueduct Board, in the city of New York, for and in behalf and in the name of the Mayor, Aldermen, and Commonalty of the city of New York, might acquire title to the lands lying between Eighty-sixth and Ninety-sixth streets, and Fifth and Seventh avenues, or so much as they might deem advisable, for the purpose of constructing a new reservoir in the city of New York, under the authority of the Common Council.

Provision is then made, in various sections, for the presentation of a petition to the Supreme Court, appointment of Commissioners, &c. When the report was confirmed, the Mayor, Aldermen, and Commonalty, shall become seized in fee of the lands, &c., required for the purpose of the new reservoir aforesaid; in trust, nevertheless, that the same be appropriated as and for a reservoir of the Croton Aqueduct.

By an act passed April 16, 1860, the Croton Aqueduct Board, for and in behalf and in the name of the Mayor, Aldermen, and Commonalty of the city of New York, were authorized to acquire title to a piece of land on Ninety-second street and Ninth avenue, as described in the act; application was to be made to the Supreme Court for the appointment of Commissioners of Appraisement. Sections 3, 4, 5, 6, 7, 8, 9, and 10 of the act of 1853, before cited, were to apply to this act in the same manner and to the same effect as if they were enacted therein. Any motion might be made at Special Term.

The Croton Aqueduct Board was authorized to erect a junction gate, and a branch aqueduct to connect the same, on the land to be acquired.

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When the branch aqueduct and sewers were constructed, the portion of Ninety-second street authorized to be acquired should be held by the Mayor, Aldermen, and Commonalty, in the same manner as other public streets and avenues are held by them.

In Bailey *vs.* The Mayor of New York (3 Hill, 531; 2 Denio, 433, in Error), it was held, that the powers conferred by the several acts of the Legislature were not, strictly and legally speaking, conferred for the benefit of the public. The grant was of a special, private franchise, made as well for the private emolument and advantage of the city, as of the public good. The State, in its sovereign character, had no interest in it. The whole investment, and the revenue and profit to be derived therefrom, were a part of the private property of the city—as much so as the lands and houses within it.

If powers are granted for public purposes exclusively, they belong to the corporate body, in its public, political, or municipal character. But if the grant was for the purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the Corporation, *quoad hoc*, is to be regarded as a private company. It stands on the same footing as would any individual, or body of persons, upon whom the like special franchises had been conferred.

The title of the property taken by the Water Commissioners was vested, by the 14th section of the act, in the Corporation of New York. The dam and aqueduct became their property. (Opinion Chancellor Walworth.)

The Commissioners, although not appointed by the Corporation, but by the State, were so far servants and agents of the Corporation, as to subject the latter to a liability for their acts and omissions.

In Clark *vs.* The Mayor, Aldermen, &c., in the Court of

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Appeals, 1860, this decision was referred to; and it was held, that the Commissioners were the agents of the Corporation in making the contracts for the work. A power to alter the form, dimensions, or material of the work, was reserved in a contract made with the plaintiffs. They abandoned a considerable portion of the work comprised in the contract. The plaintiffs persisted in going on with it, and it was held, that an action by them could not be sustained.

In The Trustees of the Cannon Street Church *vs.* The Mayor, &c. (Special Term, Superior Court, 1855, Hoffman, Justice), it was decided that the imposition of the Croton rates, for use of the water, was not a tax in such sense as to fall within the exemption of a building for public worship from taxation. (1 R. S., 388, § 4, subd. 3.) That the Croton Water Aqueduct vests in the Corporation, in the same manner as the piers that are owned by it. The charge was a rent for the use of property.

The Powder Magazine.

As early as 1728, we find, on Line's Map, an erection called the Powder House, situated between the Collect and what was called the Little Collect. It also appears on Grim's Diagram of 1742, (Manual for 1856;) and on Hill's Map of 1782.

In the act of Assembly of 1st November, 1733, there is an express reservation of the right of the Corporation to the Powder House, the hummock on which it is situated, and the causeway leading to the same. (Van Schaick, vol. i. See *ante*, Tit. "Common Lands.")

In an act of the Legislature, of April 3, 1807 (Sess. 30, p. 134), the recital is: "Whereas, the Mayor, Aldermen, and Commonalty of the city of New York have, by their memorial to the Legislature, represented, that the Powder

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Magazine belonging to the said city near the Fresh Water Pond, has, from the increased settlement in the neighborhood, become dangerous, but that the Common Council, having assented to the keeping of the public stores therein, do not think themselves authorized to move the same, without the concurrence of the Legislature, and therefore prayed that the Legislature would erect a building for keeping the powder belonging to the State." The act then provided for erecting a suitable building, at such place, within the city of New York, as the person administering the government of the State should think suitable.

An act was also passed, March 11, 1808 (Sess. Laws, p. 275), authorizing the purchase of a lot of ground for the site of a powder magazine—a half acre was to be bought.

It appears that the Governor purchased ten acres instead of half an acre, and this was ratified by an act of March 29, 1809. (Sess. Laws, p. 524, § 14, Webs. & Skinner.)

In 1797, it was ordered that the ground belonging to the Corporation, in the vicinity of the old Powder Magazine, be surveyed and staked out, and that the same be filled up to a proper height.

It has been shown (*ante*, p. 125), that the title to the swamp, as distinguished from the Fresh Water Pond, passed to Rutgers under the patent of 1733.

Land originally taken for Canal street.

By an act of March 24, 1809 (32 Sess., ch. 103), Commissioners were appointed for the purpose of laying out a street in the city of New York, which had been theretofore directed by the Mayor, Aldermen, and Commonalty to be opened by the name of Canal street, and which should be run from the place commonly called the Collect to Hudson's River, to be so laid out that it may contain a canal for the discharge of the waste waters of the adjacent parts.

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By an act of April 2, 1810 (Sess. 33, ch. 127), it was recited as follows: "Whereas, it has been represented to the Legislature, that certain lands (which were taken by the Mayor, &c., of the city of New York, and converted to the purposes of opening and forming a street in said city, by the name of Canal street, and for which damages have been assessed and judgment rendered thereon, according to the act in such case made and provided) have been left out of the said street, in consequence of an alteration made in the plan thereof, by the Commissioners appointed for the purpose of laying out the said street, under the act passed March 24, 1809, and that doubts are entertained of the authority of the Mayor, Aldermen, &c., to dispose of or convert the said lands, so taken for the said street, and left out as aforesaid, to any other use or purpose than that of a public street, for which the same were taken. And, whereas, it appears to the Legislature to be reasonable and proper that the Mayor, Aldermen, &c., should be enabled to dispose of the said lands so left out of the street as aforesaid."

The statute then provides, that where lands had been ceded or released for a valuable compensation, for the purpose of such street, or which had been taken for such street and damages assessed therefor and judgment rendered thereon, and had been left out of such street in consequence of the alteration made in the plan of the Commissioners, it should be lawful for the Mayor, Aldermen, &c., to release and convey such lands to the proprietors of the lands adjoining and in the rear thereof, for the sums which were paid for the purchase thereof, or assessed to the former owners thereof for the damage and recompense due to them respectively for the same, with interest, and a proportionate part of the expenses; in case of the neglect or refusal of such proprietors to accept such release and con-

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veyance within a time after notice prescribed, it should be lawful for the Mayor, Aldermen, &c., to sell and dispose of the same, and execute sufficient deeds therefor in fee simple.

The action of the Corporation referred to in the first-mentioned act was in 1805 (Minutes Com. Coun., 1805).

The committee on the subject of the tunnel presented their report in favor of an open canal, to pass through a street one hundred feet wide; whereupon it was resolved that a street of one hundred feet in breadth be accordingly laid out, and that the Street Commissioner be authorized to receive cessions for that purpose from the proprietors who are willing to cede, and that a canal be constructed under direction of the Street Commissioner.

In February, 1803, a survey of the then intended canal or tunnel was made by Charles Ross. It is referred to in a minute of ———, 1805, directing the Street Commissioner to report the names of the owners of land in the direction of the canal or tunnel.

See the map, Street Commissioner's office.

In 1796 it was ordered by the Common Council, that the committee on the subject of a canal from the Fresh Water Pond to the Hudson River be instructed to confer with the proprietors of the swamp, for the obtaining such parts thereof as may be required to make the said canal of the breadth of forty feet, and a street on each side, of the breadth of thirty feet.

SECTION VI.

LAND UNDER WATER ON LONG ISLAND SHORE.

The charter of Lord Cornbury, of 1708, is the foundation of the claim of the Corporation to the soil under water at Brooklyn, whatever that claim may be.

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Important questions between Brooklyn and New York, yet unsettled, depend upon this charter, of which the following is a careful analysis.

1st. *The recital states* a petition of the Mayor, Aldermen, and Commonalty of New York to the Council, setting forth,* "that they had a right and interest under divers charters and grants, by divers former Governors, in a certain ferry from the city of New York over the East River to Nassau Island (alias Long Island), and from the said island to the said city again, and had possessed the same and received the profits for fifty years and upwards."

2d. Next setting forth, "that perceiving the profits usually issuing out of the same to fall short of what might be reasonably made of the same, for want of the bounds and limits to be extended and enlarged on the said island side, whereby to prevent divers persons transporting themselves and goods to and from the said Island of Nassau (alias Long Island), over the said river, without coming or landing at the accustomed places, where the ferry boats are usually kept and appointed, to the great danger of the city"—

3d. Therefore, that they prayed, "our grant and confirmation, under the great seal of the Province, of the said ferry called the Old Ferry, on both sides of the said East River, for the transportation of passengers, goods, horses, and cattle to and from the said city, as the same is now held and enjoyed by the said Mayor, Aldermen, and Commonalty of the said city of New York, or their undertenants."

"*And also all that the vacant and unappropriated land* from high water mark on the said Nassau Island (alias Long Island), being contiguous and fronting the said city of New York, from a certain place called the Wallabout unto the

* See the petition, Appendix, Note 25.

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Red Hook, over against Nutten Island, for the better accommodation and improvement of the said ferry."

"*With* full power, leave and license to set up, establish, maintain, and keep one or more ferry or ferries, for the ease and accommodation of all passengers and travellers, for the transportation of themselves, and goods, horses, and cattle aforesaid, as they shall see meet and convenient and occasion require."

"And to establish, ordain and make by-laws, orders and ordinances for the due and orderly regulation of the same."

This petition, when analyzed, first states the fact of the possession of one ferry for the space of fifty years, called the Old Ferry; then represents a diminution of the profits which had and might accrue, for the want of such an extension of the bounds and limits on the Long Island side, as might prevent persons crossing over and landing at other places than where the ferry boats land. To redress this evil, they ask a grant of the vacant and unappropriated land between high and low water mark, from one designated point to another; that the ferry might be better improved and accommodated; *and also*, to establish as many ferries as they choose, within the bounds aforesaid.

The charter then proceeds: "*The which petition*, we being minded to grant, KNOW YE, That we have given, granted, ratified and confirmed, &c., unto the Mayor, Aldermen, and Commonalty, and to their successors and assigns, all that the said ferry, called the Old Ferry, on both sides of the said East River, for the transportation of passengers, cattle, &c., over the said river, to and from the said city and island, as the same is now used," &c.

"And also, all that the aforesaid vacant and unappropriated ground lying and being on the said Nassau Island (alias Long Island), from high water mark to low water

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mark aforesaid, contiguous and fronting the said city of New York, from the aforesaid place, called the Wall-About, to Red Hook aforesaid; that is to say, from the east side of the Wall-About, opposite the new dwelling-house of James Robine, to the west side of Red Hook, commonly called the fishing place; with all and singular the appurtenances and hereditaments to the same or any part or parcel thereof belonging; together with all the rents, issues, profits, ways, waters, easements which have, or are, or shall belong to the said ferry, *vacant land and premises*, herein granted and confirmed, and all our estate, right, title and interest of, in and to the said ferry, *vacant land and premises*, and any part and parcel thereof, and the reversion and reversions, remainder and remainders thereof." Then follows the reservation of the right of the persons, having plantations near the said river by the water-side, to transport themselves and families in their own boats.

The Habendum is, "*To have and to hold* all and singular the said ferry, *vacant land and premises*, and all the rents, issues and profits, &c., unto the said Mayor, Aldermen, and Commonalty of the city of New York, their heirs and assigns forever, to be holden of us, our heirs and successors, in free and common socage, as our manor of East Greenwich, in the county of Kent, within our kingdom of England."

Then follow the clauses more particularly relating to the ferries, quoted *ante*, Tit. "Ferries."

The charter of Montgomerie granted and conveyed, distinctly and severally, *first*, the ferry and ferries on both sides of the East River, and all other ferries now and hereafter to be erected and established all round the Island Manhattans; "*and also* all the ground, soil or land between high and low water on the said Island of Nassau, from the

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east side of the place called the Wall-About to the west side of Red Hook."

Question between New York and Brooklyn.

The important question between the city of Brooklyn and New York, still undetermined, is, whether the latter possesses an absolute right of property to the soil between high and low water mark within the points specified. I proceed to state some reasons in support of the claim, and the grounds on which, as far as I am apprised, it is resisted.

1. The whole frame of the grant—the language employed—the unequivocal literal meaning, indicate a conveyance of property in fee. The grant and confirmation is of the *ferry and the vacant land*, as contradistinguished. It comprehends all the estate, right, title and interest in the ferry, *and the vacant land*. The Habendum is for the ferry *and vacant land*, with every usual phrase to transfer an estate in fee; and the tenure is, that of the manor of East Greenwich, in Kent, in free and common socage.

Now, if nothing was to be conveyed but an additional right, and an exclusive right to erect and maintain ferries within certain limits, and to occupy such portions of the ground as should be necessary therefor, why were these comprehensive, technical, and emphatic terms employed, when language much more simple and more restricted would have better answered the purpose?

2. The Corporation of New York had in view, both in the memorial of 1702 and in that of 1707, the prevention of the establishment of fixed ferries by others, and the employment, by the residents on the Long Island shore, of their own boats for general ferry purposes. To avert and redress the evils and losses arising from these sources, they do not merely ask the exclusive right to erect ferries within the limits; but they ask, as the more effectual and decisive remedy, the grant of the soil under water along that line of the shore where the evil chiefly existed, and would prevail.

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It is a striking fact upon the question of exposition by cotemporaneous documents, that when the petition of 1702 was presented, the Trustees of Brooklyn interfered by a caveat; and remonstrated, not as to the grant of the right of ferries exclusively, but distinctly against a patent for any land between high and low water mark, within the points. (See the caveat at the foot of the petition, Note No. 25.)

3. The Corporation of New York have assumed to convey this strip between high and low water; and grants have been accepted by parties from them, so that the principal part of the shore, from Joralemon street up to Fulton street, is held under such grants.*

It by no means is to be argued that the acceptance of such transfers, by some, establishes a right against others; but it proves the assertion of the claim, and a partial acquiescence in it. At any rate, it has never been allowed to sleep; much less has it been relinquished.

This right has once been judicially recognized.

On the 19th of June, 1815, the Counsel of the Board (D. S. Jones, Esq.), and the Comptroller, reported to the Board, "that several of the ejectment suits heretofore commenced by order of the Board, to recover possession of the land at Brooklyn, between high and low water mark, which was in the possession of various persons claiming adversely to the Corporation, were carried down for trial at the late circuit of the Supreme Court, for Kings county, and that, after a very contested trial in the suit first called on, a verdict was obtained for the plaintiff therein. This trial having established the right of the Corporation, the defendants in the other causes (except one) suffered a verdict to be entered against them under a certain arrangement with the Counsel, which is then set forth, and submitted for approval."

* Note No. 26.

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This agreement was ratified, and it was referred to the Comptroller, to report a rate of quit-rents for the water lots on Long Island shore.

On the 4th of December, 1815, the Counsel presented grants to several persons, drawn in pursuance of the late resolution on the subject of the Brooklyn grants, which were directed to be executed.

On the 11th of March, 1816, the Comptroller reported a rate of quit-rents.

4. A series of statutes relating to the establishment of an exterior line at Brooklyn, and conferring the right to fill out and erect wharves, requires notice upon the subject.

By an act of the 12th of February, 1836,* Obadiah Jackson was authorized to erect and maintain one or more docks or wharves, adjacent to his land, in the First Ward of the city; bounded north-easterly by Fulton street, and north-westerly by the East River; also, in front of another piece of land, both of which are fully described in the act. There was a reservation that the wharves should not extend further than the permanent exterior line which might be by law established.

By an act passed May 25th, 1836,† "Henry Patchin, Anson Blake, Charles Kelsey, and others, were empowered to construct and maintain one or more wharves, docks, and piers on the land under water, in front of their lands, in the city of Brooklyn, not to extend beyond the following lines." The commencement is from a point on the continuation of the north-westerly side of Partition street, seven hundred feet from the north-west corner of Partition and Ferris streets; and its termination is a point in continuation of the southerly side of Atlantic street.

The second section of this act provided for the appointment of Commissioners to determine a suitable line on the

* Sess. Laws, p. 25. † Ibid, p. 739.

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East river, in front of the city of Brooklyn, upon which a permanent line of bulkhead might be erected without injuring the navigation, from a point on a continued line of Atlantic street to Jackson street ferry (now Hudson avenue).

And the third section provided that nothing in the act contained should be taken or construed to destroy, abridge, or in any manner impair the rights of the Mayor, Aldermen, and Commonalty of the city of New York in respect to the land between the lines of high and low water along the Brooklyn shore of the East River; nor should the act authorize any dock or wharf to be erected upon any of the lands belonging to the city of New York, without the permission of the Common Council of said city first had and obtained.

In an act to incorporate the Atlantic Dock Company, passed May 6, 1840, power was given to erect docks, bulkheads, piers, &c., in the Sixth Ward of the city of Brooklyn, within the line established by law for the erection of docks and bulkheads, and to receive wharfage therefor. And the 8th section of the act is precisely the same as the 3d section of the statute of 1836.

This act of May 25, 1836, was amended by a statute of May 26th, 1841. Authority was given to the owners of the land lying "along high water mark, from the foot of Butler street, on the East River, to Red Hook, to erect and maintain one or more wharves, &c., on the land under water in front of the exterior line provided in the act so amended, as far out into the river as the following line."

This line begins the extension at Partition street continued, and runs to the westerly corner of Butler and Columbia streets continued.

Undoubtedly the reservation in the original act will apply to this amended act.

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Another act of the 31st of March, 1848, enabled owners to build wharves, from a point on the southerly side of Atlantic street up to Jackson street ferry upon a new line —and it contained the same reservation in favor of New York.*

This was amended on the 10th of April, 1850, enabling such owners to go out to the exterior permanent line established by law for the construction of bulkheads.

Another act was passed on the 3d of April, 1851,† giving similar powers to the owners of lands fronting the water in the vicinity of Reed, Bryant, and other streets. This property lies in the south-east part of Brooklyn, considerably to the south-east of the Red Hook Point.

The same reservation of the right of New York is made in this act as in the 3d section of that of 1836.

The report of the Commissioners appointed under the act of May 25, 1836, was made on the 31st of December, 1838, and was confirmed by an act of the Legislature, passed February 28th, 1839.

They established the following as the permanent line of bulkheads in the East River, in front of the city of Brooklyn: "beginning at a point established by the act above mentioned at the southerly side of Atlantic street, and running thence in a direct line north-easterly, until it shall intersect a line made by continuing the northerly line of Middagh street, at the distance of two hundred and ten feet from the westerly line of Furman street; thence in a direct line until it shall intersect a line made by continuing the southerly side of Plymouth street, at the distance of fifty feet from the most westerly end of the easterly pier in the possession of the Fulton Ferry Company; thence in a direct line until it shall intersect a line made by continuing the westerly side of Fisher street, at the distance of

* Sess. Laws, 1848, ch. 156, p. 166. † Ibid, 1851, ch. 83, p. 100.

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two hundred and seventy-three feet from the southerly side of Plymouth street; thence in a direct line to the northernmost point of the dock next east from Jackson street Ferry. As Jackson street Ferry was about the foot of the bulkhead, which is south of Fulton Ferry, would be much exposed to the winds and swells from the bay, it would probably be necessary to extend piers from that part of the bulkhead into the stream." The manner of doing this is suggested.

In the execution of their duties, the Commissioners gave a written notice to the Mayors of New York and Brooklyn of their place and time of meeting upon the subject. A communication was ultimately received from Mr. Emmet, the Counsel of the Common Council of New York, stating that it was deemed inexpedient to offer any suggestions as to the permanent line of bulkhead which the Commissioners were appointed to determine; that the Municipal authorities of New York had a deep interest in the subject, arising from the rights and property held by them in Brooklyn; but it was considered that the third section of the act under which the Commissioners acted afforded a sufficient protection to the rights and property of the city; and as it respected the line to be adopted, the utmost confidence was placed in the discretion of the Commissioners.

The grounds upon which the claim of New York to the strip of land in question is resisted, as far as I am informed, are these:

1st. That the property had been before vested in the town of Brooklyn by valid grants; and of course any instrument, purporting to transfer it to New York, was nugatory and void.*

* This view is put forth, at considerable length and with much ability, in a discussion of the right of New York and Brooklyn, in the edition of the Charter of Brooklyn, of 1841.

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2d. That the grant of the space was not an unqualified grant of property in fee, but only in subservience to ferry privileges; that the soil was only to be taken and used when the Corporation exercised the public power of establishing ferries.*

1st. The legal muniments and positions referred to, for the purpose of repelling the claim of New York, are, I believe, the following:

1. A charter was granted by Governor Nichols to the town of Brooklyn, on the 18th of October, 1667. It is sufficient, in connection with the present subject, to state, that the only clause in it which refers to a river boundary is the following: "And so eastward, along the said hills to a south-east point which takes in all the lots behind the swamps, from which said lots they run north-west to the river, including within the said bounds and limits all the lots and plantations lying and being at Gowannus, Bedford, Wall-Abought, and the Ferry," together with all the havens, harbors, &c.

On the 30th of May, 1686, Governor Dongan granted a charter, confirming the charter of Nichols to certain persons, for and on behalf of themselves and the other inhabitants of Brooklyn.

The act of the Colonial Legislature, of October, 1691, before fully stated (*ante*, ch. I., sub. 11), recognized these as well as other charters.

The legal proposition, that a grant from the sovereign power bounded by a navigable river extends only to high water mark, is so definitely settled in England and in our State, that it must be assumed in all reasoning as incontestable. This was the common law; this the rule of construction of all English grants and charters in the colonial days.†

* This argument is urged in a printed opinion of one of our most distinguished lawyers, which I have had the opportunity of examining.

† See Appendix, Notes 43, 44, for collection of authorities.

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That the crown and the State could convey in absolute proprietorship the space between high and low water, along a navigable river, is a position equally free from doubt.*

That the charter of 1708 conveys such space to New York—that the charter of 1730 confirms and supports such conveyance, or operates as a fresh conveyance—and that the act of the Assembly of 1732 would actually transfer the title, by referring to and adopting the grants of the charters, if they were in themselves invalid, appear to be undeniable propositions.

Now the charter of Nichols to Brooklyn, in 1667, fixes the line or boundary on the East River, upon the general rule of law, at high water mark only. The lost charter of Stuyvesant, of 1657, referred to by the writer, may be presumed to have had a similar limit. 1st. Because the Dutch charters generally, which extend the land to the river, use the terms, *River*, *Bay*, *East River*, *&c.* 2d. Because the presumption is against the governors, who made the grants to New York, having violated the vested rights of others; and 3d. Because by the law of Holland the right of owners never extends below the bank or margin of any class of rivers, except perhaps those brooks which are dried up at certain seasons of the year.

But the argument for Brooklyn is next presented in this form.† That the Duke of York took the strip in question as a subject and private owner; that his grants must be treated as the conveyances of private owners are treated, and hence that Nichols' charter to Brooklyn, in 1667, fixing the boundary on the East River, carried the right of property *ad filum aquæ*, or at least to low water.

* See Appendix, Notes 43, 44, for collection of authorities.

† The learned writer uses the same argument as to Stuyvesant's grant. As this is lost, we are scarcely at liberty to reason upon it, or to presume that it was made as a subject or owner, not as representing the government.

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The answer to this argument may thus be stated. It is settled by the cases in New Jersey, and by the case of Martin *vs.* Waddell (16 Peters' U. S. Rep., 338), that the grant of Charles to the Duke of York transferred the right to the navigable rivers, bays and arms of the sea as part of the *regalia* or royalties, and not in absolute proprietorship, as the land was transfered. The crown held these in trust for the public—so did the Duke. What and to what extent the Crown could grant the Duke could grant, and no more nor further. It follows, that in making any such grant he acted as the representative of the crown. And it necessarily also follows, that his grants of such rights are to receive the same construction as the grants of the Crown, viz., to convey nothing but what is expressly specified, and to be interpreted against the grantee.

The charter, then, to Brooklyn, of 1665, fixing the limit on the river, can extend only to high water mark. But the Crown could convey the space between high and low water, at any rate, subservient to the rule, that navigation was not to be impaired.

The Crown, it is true, must use express terms for this purpose, and such terms were used in the charter of 1708, and in that of 1730; all embodied in and renewed by the statute of 1732, in which the whole power of government concurred, and which was equivalent to an act of Parliament.

It is stated by the same writer that the Hook was originally patented to Wouter Van Twiller, and that the grant extended in express terms to low water mark; and that, in defiance of this right, the Governor of the Province attempted to transfer the property to the Corporation.

There is one grant from the Dutch Governor to Wouter Van Twiller, dated the 22d of June, 1643, in the office of the Secretary of State. This is the only grant, connected

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with Red Hook, to him which can be found there, or any trace of which I have been able to discover. This merely gives a piece of land called Red Hook, lying on the Hudson River, to be held as other his patrimonial lands. "We renouncing all ownership of the Red Hook aforesaid, and the marsh thereto appertaining."

But there is reason to believe that this patent was not for land on Long Island at all. At least, it could not have taken effect; for the writer in question states that in a deed of August 10th, 1695, from the patentees and freeholders of the town of Brooklyn, to Stephen Van Cortlandt, for a neck of land, called Red Hook, containing about fifty acres, it is recited that it was formerly given and granted to the town of Brooklyn, by Governor Stuyvesant, in 1657, and since confirmed by the English Governors, Nichols and Dongan.

There can be no doubt that this last was the parcel of land for which Stephen Van Cortlandt took a confirmation from Governor Fletcher, in 1697, and afterward came into possession of John Van Dyck, by a conveyance of May, 1749. The boundaries in these instruments are fully set forth hereafter, and they include the soil to low water mark. The argument, therefore, of the writer is just as strong in the actual as in his imaginary case. The title of 1697 must be better than any which can be claimed under the grant of 1730.

But it has been forgotten that the petition and the consequent grant are only "for *that the* vacant and unappropriated land from high to low water," between the designated points. The Corporation could not take any parcels before duly granted, and did not ask for, nor did the charter profess to confer them. And it is to be remarked, that the petition of 1702 expressly asks for the grant from the east side of Red Hook. (See Note 25.)

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A trial and judgment, had in the year 1775, are also referred to. Hendrick Remsen brought a suit against the Corporation. A special verdict was found, setting forth all the patents and charters, (except those to New York before the Dongan charter), "and that the road from which Remsen ferried the inhabitants of Brooklyn to and from New York, then and long before was laid out for a public highway, leading down to low water mark, on the East River, between the place called the Wall-Abought and the Red Hook, on Nassau Island," and finding that the East River over which the said Remsen carried the goods, &c., was a large navigable river. On argument, judgment was rendered by the Supreme Court, in October, 1775, in favor of H. Remsen. An appeal to the King and Council was brought, which was not determined, in consequence of the Revolution.

If in this case the highway had been laid out down to low water mark, prior to 1708, it may well be, that there would be an exception out of the grant of the strip between high and low water. Still it is difficult to understand how this could have given a ferry privilege to Remsen or any others. There is nothing in the case showing that a ferry had been there established before 1708.

2. The other material position taken, in opposition to the claim of New York, is "that the right to the strip of land was a qualified public right, to be used in connection with the establishment of ferries, and for their protection; and that, in all other respects, the right of the Government and of the riparian owners remained after, as they stood before the grant."

"That the grant was for the better accommodation and improvement of the ferry, and future ferries: that for these purposes the bounds and limits were to be extended and enlarged on the island side, and that it was a

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grant of a qualified public interest in this strip of land, giving the Corporation a right to use it for the purpose of establishing ferries from time to time, and to protect them; but not designed to convert this strip into private property, and vest it in absolute ownership in the Corporation. The courts had a right to look to the purposes and qualify the grant accordingly."*

It is true that the general terms of a grant may sometimes be restricted, by a recital, or other portions of the instrument, to a narrower meaning than they literally impart. But this is true only when it is obvious that the restricted meaning fulfills every object and intent of the grant, and that the extended meaning is for that purpose unnecessary.† Now, while a grant to establish ferries anywhere within the points mentioned, coupled with a grant of the strip between high and low water wherever the ferries should be established, might have answered the object so far as the right to erect ferries was concerned; yet how would it attain the other great object of checking transportation from any place within the limits? At any rate, it is clear that this latter object was more decisively attained by interposing a strip of land in absolute property along the shore, than by any other mode.

The intent of the Government, clearly, was not barely to confer the power of establishing ferries between the two points, but to render that power exclusive and effectual. The question is not, whether a less extent of power and property would not have probably sufficed; but whether the grant, according to its plain construction, was not the most effectual? Now, if the objects are best attained by the natural legal construction of the terms, why should they be restricted by an unnatural and forced interpretation?

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* Opinion before referred to.

† 5 New Hampshire, 467; 8 Shepley, 69; Field *vs.* Bustore.

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The position is also founded on a view of the ferry right, now exploded. The right of the Corporation of New York is treated as a mere political or administrative power, and not the grant of a private franchise in property. It may be confidently stated that the opinion of Chancellor Kent, the decision of Judge Barculo, and the views of the Supreme Court, in Britton *vs.* The Mayor, &c., settle this question; and that the right of the City is as much a right in property as its title to the City Hall.

It is also urged that the rights of the riparian owners are violated by such a grant, if it is one of property in the soil. The rights of docking out, of navigation and fishing, are specified.

Nothing can be more fully settled in our State, following the English law, than that the riparian owner has no right to dock out between high and low water, unless expressly authorized by the public authority.

So in respect to fishing in the waters between high and low water, the riparian owner has, by reason of his ownership, no better or other right than another citizen, except what the use of his land for netting gives him. And it is the better opinion, strengthened by the universal practice around New York, that the Corporation hold such property, like the government, subservient to the common right of fishing, until such time as they take actual possession by improvement, or sale to individuals.

A similar answer may be given to another objection, viz.: the impeding of the owners in navigation. The right to navigate the waters remains in the public, until an actual occupation or sale vests the soil in full proprietorship. The riparian owner had the right as one of the public, and has no other or greater right.

In another part of this work (Notes 43, 44) I have stated the leading authorities for the various positions here taken. To these I refer.

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Limits of the Grant.

Almost any map of Brooklyn or the harbor of New York will show a bold projection of land, forming the southern point of Buttermilk channel, and opposite Nutten Island. Its extreme north-westerly point is a short distance below the southern extremity of that island, and almost directly opposite to the northern extremity of Bedlow's Island. This projection is called Red Hook. To the eastward and northward of this extreme point was a deep indentation of the shore, extending to a bold point a little south of the middle of a body of water, called Cornell's Mill Pond, and about the foot of what is now Sebring's street. The cove thus formed was, it is supposed, the fishing place.*

The petition of 1708, for the strip in question, was for "the land vacant and unappropriated between high and low water, on Nassau Island, contiguous and fronting the said city of New York, from the Wallabout to the Red Hook, over against Nutten Island." (Note 53.)

There can be no difficulty in saying that all the phrases are consistent with the extension of the grant up to the extreme west point of the Hook. The grant is in the same words, viz.: "to Red Hook aforesaid, with this addition, that is to say, 'from the east side of the Wallabout, opposite the new dwelling house of James Robine, to the *west side* of the Red Hook, commonly called the Fishing Place.'"

In illustration of the meaning, the charter of Montgomerie may be referred to. The grant (§ 37) is "from the east side of the place called Wall-About, to the west side of Red Hook."

And in the boundary of the South Ward, after running across the East River, we have, "And from thence to run along the said shore at low water, to the south side of Red

* See especially Colton's map of 1837.

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Hook; and from thence to run a line across the North River, so as to include the Nutten Island, Bedlow's Island, Bucking Island, and the Oyster Island, to low water mark on the west side of the Hudson River."

In order to carry the line up to "the west side of the Red Hook," as called for, we must, I apprehend, go to the extreme north-west point of the projection. The map shows that, from this point, the shore trends for a considerable distance nearly south; and although the west side might be found at the southern end of this line, yet that would not meet the necessity of being "over against Nutten Island."

It is no objection that, in the ward boundary, the phrase is, "to the south side of Red Hook." A glance at the map will show how this would carry the ward boundary to a sharp projection, which forms the south point, from whence the shore trends abruptly to the eastward. On the map of Ratzer, of 1766, the boundary line of the ward is made to run down this north and south line to the extreme southern point of the Hook. From thence it runs across the river.

If the cove referred to was the fishing place, then the water at the north-west point was as much such a place as any other part of it. But it is impossible to get to the west side of the Hook, without comprising the shore in the cove up to such north-west point, or crossing the cove. It cannot be crossed, because we must follow low water mark.

There can be little difficulty, then, in saying, that the grant ran up to the north-west extremity of the Hook. Whether it ran down to the south-west point, may be disputed. It should also be noticed, that in the first petition, that of 1702, the Corporation asked for a grant to com-

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mence on the EAST side of the Hook, and thence to the Wallabout.

There is a grant by Governor Fletcher, in 1697, to Stephen Van Cortlandt, which goes far to settle the question as to the extent and boundary of the Hook. A patent was issued by Fletcher to Stephen Van Cortlandt, one of his Majesty's Council, dated the 16th of June, 1697, upon petition for a grant and confirmation "of a certain messuage, mill, mill dam, and tract of land, and meadow unto low water mark, as far as a place called Kotiu's Kill, then in his keeping and possession, and whereon he has made considerable improvements, situate and being on the Island of Nassau, formerly called Long Island, over against our city of New York, and our Island called Nutten Island, containing in quantity fifty acres, more or less, and is bounded on the east by the east side of a creek that runs by the westernmost bounds of Frederick Lubbertse's land, and on the south by Gowannus bay, and on the west by Hudson's River, and on the north by the East River that runs between the said lands and our Nutten Island aforesaid, at low water mark, including the aforesaid creek, which maketh the east bounds of the said lands." (Patent in the office of Secretary of State.)

The grant from the patentees of Brooklyn, of 1605, before mentioned, no doubt transferred this same parcel of land, and Van Cortlandt took a confirmation. The same premises were conveyed on the 22d of May, 1749, by one Folpey Van Hoesen to John Van Dyck. (Records Kings county, Lib. E., p. 176.)

By other conveyances, the title got into N. & M. Van Dyck (Deed of 22d May, 1712. Bayard to M. Van Dyck. Deed, May 16, 1784, N. Van Dyck to M. Van Dyck); and there is to be found a series of conveyances made in 1835, of property of the heirs of N. & M. Van Dyck, a careful

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examination of which may probably establish where the eastern line of the Red Hook touched the East River. I refer especially to a deed of Johnson to N. Waring, of December 1, 1835, the point of beginning of which is at the northerly corner of Dyckman and Ferris streets.

The Hook may, I think, be traced and defined with an approach to certainty on Rutzen's map of 1766. It ran, as we find by the previously cited documents, from the creek to the bay; and the eastern side of the creek was its eastern limit. There it joined Frederick Lubbertse's land. On the map referred to, we find two inlets or creeks, setting from the Gowannus bay, and running across the neck nearly to the river. They are within a short distance of each other. That one or other of these formed the line, I think cannot be doubted. Which of them did so is uncertain, as far as I have examined the matter. Frederick Lubbertse's land was acquired under a ground brief of Kieft, Director General, on behalf of the States General, and the managers of the Incorporated West India Company, of the 27th of May, 1640 (printed case, Mayor, &c., *vs.* Benson, p. 106). This was confirmed by Nicolls, 28th March, 1667. (Ibid., 108.) The description is as follows: "Extending in breadth from the hill and marsh, leading from Gowannus, north-west by north, and from the beach on the East River, with a course south-east by east, 1,700 (seventeen hundred) paces of three feet to a pace, and in length, from the end of said hill, north-east by east, and south-west by west, to the Red Hook."

I presume that the boundaries of the Lubbertse's grant may be ascertained by a diligent search in the records of the county. But without pursuing that inquiry further, it seems to me there is great reason to suppose that the boundary on the East River, of the Red Hook parcel, was in the vicinity of Sebring street.

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And thus, although the language of the charter carries the grant to the north-west point of the Hook, yet, as it was only for all *the* waste and unpatented land under water, and there had been a previous grant of such land along the shore of the Hook, every right and grant is made consistent. There is no difficulty left but to settle the point at which the Red Hook grant, of 1697, commenced on the East River.

SECTION VII.

RIGHT TO LAND UNDER WATER, BETWEEN HIGH AND LOW WATER.

By the third section of Dongan's charter, there was granted "to the Mayor, Aldermen, and Commonalty of the City of New York, all the waste, vacant, unpatented, and unappropriated land lying and being within the said city of New York, and reaching to the low water mark in, by and through all parts of the said city of New York and Manhattan's Island aforesaid, . . . not before granted by any Governors or Lieutenant Governors, under their seals, or seals of the Province, or by any former Mayors, Aldermen, or Commonalty."

The 14th section of Dongan's charter granted to the Mayor, Aldermen, and Commonalty, power and authority "from time to time, when they should see fit, to fill up, take in, make and lay out all and singular the land and ground in and about the said city and Island Manhattans, and the same to build upon, or make use of in any other manner or way, as to them shall seem fit, as far into the rivers thereof, and that encompass the same, as low water mark aforesaid."

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The 37th section of the charter of Montgomerie gives, grants, ratifies and confirms, unto the Mayor, Aldermen, and Commonalty of the city of New York, among other things, "all the waste, vacant and unappropriated land, lying and being within the said city of New York, and on Manhattan Island, aforesaid, extending to low water mark, together with the right, benefit and advantage of all docks, wharves, cranes and slips, or small docks within this city, with the wharfage, cranage and dockage, and all issues, rents, profits and advantages arising or to arise or accrue by or from all or any of them; and all rivers, rivulets, creeks and coves, pond, waters, water-courses, fishing, fowling, hawking and hunting, mines and minerals and other royalties and privileges within the city of New York and Manhattan's Island; and also all and singular the rights, privileges, franchises, ferries, ferriage, profits, lands, tenements and other real estate, not only in the grant or writing of 1686, and in the before-recited letters patent of Queen Anne, mentioned or intended to be granted or conveyed, but also which the Mayor, Aldermen, and Commonalty of the city of New York, or their predecessors, have held or claimed to hold by prescription or otherwise, silver and gold mines excepted, and also except Fort George and the grounds, full boundaries and extent thereof, and also that piece of ground near the English church, called the Governor's garden, with the swamp next to the same; saving the titles of any persons, under prior grants," &c.

The grant was of "all *waste*, *vacant*, *unpatented* and *unappropriated* lands lying within the city of New York, and on Manhattan Island, extending to low water mark, in, by, and through all parts of the said city of New York and Island of Manhattan, not previously granted."

A parcel of land may have been vacant, and yet patented or appropriated, and then it would not pass. Hence its being both vacant and unappropriated was necessary.

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Whenever a parcel of land was thus situated, it vested in the Corporation; and where it touched the shore of either river, the space between high and low water mark vested also in them by force of the grant. Hence, wherever we find that body, subsequent to April, 1686, the owner of upland, we find it the absolute owner in fee to low water of the adjacent land to low water. I of course do not now speak of an acquisition subsequent to that date, from a former private owner.

But then arises another case; that of a Dutch or English grant, made prior to April, 1686, and bounded on the river. Did the charter carry the intermediate space from high to low water in such an instance? It is here assumed, what is hereafter abundantly proven, that a grant by the government, bounded on, or fronting to a navigable river, extends only to high water mark.

I have examined nearly every grant made by the Corporation from 1686 to 1730, and a great many subsequent to that date. It may be stated as a general rule, if not an invariable one, that the source of the title to the space between high and low water mark, along the shores of the rivers, is to be found in a grant of the Corporation. It is possible that there may be exceptions; but I believe that such is the fact, even where the title to the upland was derived from the Dutch or English government prior to 1686.

Every Dutch or English patent which I have examined, made prior to this date, carries the boundary, on the river side, *to the river, or the shore of the river, to the East River or Sound, to the Hudson River*, or in words of similar import; thus limiting its operations to high water mark.

Whenever, then, a grant of upland has been made prior to the above date, and the Corporation has conveyed the intermediate space, it has done so either as the lawful owner, under the true construction of the charter, or as as-

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suming an unfounded right, and claiming under color of a grant.

In either case, the possession against the Crown and its successor, the State, originated in a deed under a claim of title; and if the twenty years, fixed as the limitation to suits by the people, have expired, the right of the State would be barred, and the origin of the title in the Corporation be established.

There would then remain but one question upon this branch of the subject, viz.: where a grant had been made previous to April, 1686, bordering upon the river, and there was no grant by the Corporation of the intermediate space, nor possession taken by the upland owner so as to make a title in him on that ground. In this instance, the question would be between the State and the Corporation, there being no view in which the owner of the upland could claim any right.

But what is the true construction of this clause of the charter? An argument in favor of the right of the Corporation to the strip between high and low water, even in the case of a grant of upland, bounded on the river, and made prior to 1686, may be thus stated.

1st. It is highly improbable that the governor intended to reserve a right in the Crown to any portion of this space in any part of the island. It is reasonable to conclude that what had not passed to individuals by any prior grant, was meant to be vested in the Corporation; and a conveyance, with the river for a boundary, could not pass this strip to individuals.

2d. The language employed admits of an interpretation favorable to the claim, although it is not one which first presents itself. The space between the two points, even in the case supposed, would be "vacant, unpatented and unappropriated land."

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3d. The grant of the four hundred feet, contained in the Montgomerie charter of 1703, was from low water mark. The object was to enable the Corporation "to fill, make up, wharf, and lay out all and every part thereof," to place the same under the control of the Corporation for commercial purposes, and to obtain one uniform system of regulation. It would be very singular that the Crown should retain any right to the space between high and low water mark, when the same was necessary for the object in view. The presumption is therefore strong, that the Corporation was considered as the owner of this space, except where such ownership had been expressly conferred upon another.

4th. So in the act of 1807, there is a recital "that for the purpose of duly regulating and constructing slips and basins, and running out wharves and piers, the right to the land under water, below low water mark, should be vested in the Corporation of the city of New York"—and thereupon the extended grant of the four hundred feet is made. To this act, and to that of 1826, the above remarks equally apply.

5th. By the original statute of the State, and by all the acts down to 1835, respecting grants of land under water, to be made by the Commissioners of the land office, their power was only so far restricted as that no grant could be made to interfere with the rights of the Corporation of New York, in and to the waters adjacent to and surrounding Great Barn Island, or Staten Island (1 R. S., 1830, p. 208). But, in 1835, a clause was introduced, prohibiting the Commissioners from making any grants of land under water, within the limits of the city of New York.

This series of acts of the government indicate very clearly that the State did not deem itself any longer entitled to

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any portion of the space between high and low water in any part of the island shore. The implied admission that the strip belonged to the Corporation is very strong.

6th. The contemporaneous documents, some public acts, and the proceedings of the Corporation, after and under the charter of 1686, will strengthen this conclusion. They will establish, at least, a strong, consistent, and continued assertion of the right on the part of the Corporation, and a marked acquiescence therein by the citizens, as well as by the State. I have put together some of these interesting historical and legal muniments in a note.* The conclusion seems almost inevitable, that the strip between high and low water marks, all around the island, passed to the Corporation, under the Dongan charter, in every case, except where, by a patent issued prior to April 22d, 1686, it was, by express language or unavoidable implication, vested in another.

I doubt if a single case of this description exists; and the consequence is, that the Corporation is the sole source of the title to every portion of this space between high and low water, now held by another; and is entitled to every portion where no grant has been made by it.

In the case of Nott *vs.* Thayer and others (2 Bosworth, 10), the judge, at Special Term, stated that the term *tide-way*, used by counsel, was appropriate to designate this strip under water, and he should adopt it. He held that it did not now admit of dispute, that the Corporation was seized of the tide-way, free from any pre-emptive privilege in any one; that they had the absolute power to dispose of it to whom they pleased, at the price they pleased, and without notice to the owners of the shore of any intended disposition. The cases of Rogers *vs.* Jones (1 Wendell, 237), Lansing *vs.* Smith (4 Wendell, 9), Whitney

* Note No. 27, Appendix.

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vs. The Mayor, &c., in the Court of Appeals, 1854, with the case of Furman *vs.* The Mayor, &c. (5 Sandf. Rep., 16, and 6 Selden, 508), had put the question at rest in our State.

When the case of Nott *vs.* Thayer was before the General Term, the learned judge who delivered the opinion of the Court, observed, that it was not disputed by either party that the Corporation had an absolute fee in the tide-way.

The line of low water has been defined by the proper officers, under the act of April, 1860, and these maps are on file in the State Engineer's office at Albany. The surveys are more particularly referred to, under the next section, as to the four hundred feet beyond low-water mark.

SECTION VIII.

RIGHT TO FOUR HUNDRED FEET BEYOND LOW WATER.

Petition of 1780.

The petition of the Mayor, Aldermen, and Commonalty, upon which the charter of 1730 was granted, prayed, among other things, "that they might have the soil four hundred feet beyond low water mark on Hudson River, from a certain creek or kill, called Bestaver's Killitjie, southward to the fort; and from thence, the same number of feet beyond low water mark, around the fort and along the East River, as far as the north side of a certain hill called Corlaer's Hook."

Grant in 38th section.

Accordingly, the 38th section of such charter, made the grant as prayed, except that it was not carried around the fort, but stopped at Marketfield street, and recommenced at Whitehall. It is set forth in the note.*

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* Appendix, Note 28.

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The extent of this grant of four hundred feet along the Hudson River, was from a point near the foot of what is now Charlton street, to the southerly side of what is now Marketfield street; and on the East River, from Whitehall, to a point near the foot of North, now Houston street.

Various acts of proprietorship and regulation were done by the Corporation under this grant, many of which will be hereafter noticed. They consisted, principally, in granting the property, making piers, and laying out streets.

The next important act of the government which bears upon these rights, was the statute of 1798.

That statute was passed on the application of the Common Council; but they had previously adopted certain ordinances, and taken certain measures, which it is of importance to notice.

In the year 1793, a resolution was passed that the outer street, along the East River, should be seventy feet in width, from Whitehall to Coenties slip. Resolution of 1793.

In the same year, a map of the East River was made by Goerck and Van Steenbergh, which is no doubt the one referred to in the ordinance of 1795, next mentioned, and is now in the office of the Street Commissioner. This map is marked by an Examiner in Chancery, as produced in a cause between Christian Bergh and the Corporation, which was pending about 1810, and is subsequently noticed. Map of 1793

On the 7th of April, 1795, an ordinance was passed of much importance, and which has escaped attention in all the opinions and causes in which the act of 1798 has come in question. It established West street and South street as the exterior permanent streets on the rivers; running the lines by courses and distances with great minuteness. It is set forth at length in the note, as also an amendment made on the 10th of February, 1796. On the same day, another ordinance was adopted, making West street the Ordinance of April, 1795 and 1796.

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exterior street on the North River, which is also set forth at length.*

Maps of shore.

A map dated in 1804, and made by Magnin, a City Surveyor, is also in the Street Commissioner's Office, and appears intended to show West street under the ordinance. There is also a map of the shore of Hudson River, made by Charles Loss, in 1807; and in the same office is a map laying down West street precisely in conformity with the ordinance. It is without date, and the name of the surveyor is torn off.

Petition for act of 1798.

After these ordinances, and in the year 1798, the Corporation presented a petition to the Legislature for an act respecting the exterior streets, which is copied in the note.†

Law of 1798.

An act was accordingly passed on the 3d of April, 1798, in conformity with this petition.‡ It will be hereafter fully dwelt upon.

Laws of 1801 and 1813.

The sections quoted in the note were re-enacted in the law of April, 1801, with the variation, that the clause "according to such plan as they shall or may agree upon and determine," was changed to "according to the plan agreed upon for that purpose."

By the 220th section of the act of 1813, the first section of the act of 1798 was re-enacted, with the variations rendered necessary by the omission of the preamble. The other sections were re-enacted *verbatim*, except the fourth, as to which there was an immaterial variation.

Law of 1820.

The 221st section of the act of 1813 is precisely the same as the second section of the act of 1798. The 222d section of the act of 1813 is embodied in, and in some respects modified by, the first section of the act of April 7, 1820. So that the law of 1798, as amended, exists in the 220th section of the act of 1813, in the 221st section of the same,

* Appendix, Note 29. † Ibid, Note 30. ‡ Ibid, Note 31.

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being the second of 1798,) in the act of April, 1820, and in the 224th section of the act of 1813. The whole of the law, as now in force, is set forth in the note.*

Another statute connected with the grant on the North River, south of Bestaver's Killitjie, was passed on the 18th of January, 1830. It provided "that it should be lawful for the Mayor, Aldermen, and Commonalty of New York, whenever West street should be made between the Albany basin and Battery place (late Marketfield street), in the said city, to alter the plan or direction thereof as heretofore laid out, approved, or agreed upon, in such manner that the line thereof shall run parallel with the line of Washington street, and that the easterly side thereof shall be one hundred and eighty feet distant from the westerly side of Washington street, at the intersection of the said street, or Battery place, late Marketfield street, in the said city." Law of 1830.

The consequence of this was, that West street, at Battery place, was carried sixty feet further into the river than it had previously been laid down; and at Albany basin, eight feet one inch further.

By the fifteenth (15) section of the act relating to the map or plan of the city, passed April 3, 1807, it was provided as follows: "Whereas, for the purpose of duly regulating and constructing slips and basins, and running out wharves and piers, it is essential that the right to the land under water, below low water mark, should be vested in the Corporation of the city of New York: Be it therefore enacted, that it shall and may be lawful for the Commissioners of the Land Office, and they are hereby directed, to issue letters patent, granting to the Mayor, Aldermen and Commonalty of the city of New York and their successors forever, all the right and title of the people of the Law of April 3, 1807.

* Appendix, Note 32.

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State to the lands covered with water, along the easterly shore of the North or Hudson River, contiguous to and adjoining the lands of the said city of New York, at and from low water mark, and running four hundred feet into the said river, from Bestaver's Killitjie, or rivulet, to the distance of four miles to the north, along the easterly shore of the said North or Hudson's River; and also all the land covered with water along the westerly shore of the East River or Sound, contiguous to and adjoining the lands of the said Mayor, Aldermen, &c., at and from low water mark, and extending four hundred feet into the said river or sound, from the north of the lands covered with water, whereof the Mayor, Aldermen and Commonalty are now seized, to the distance of two miles to the north along the westerly shore of the said East River or Sound: Provided always, that the proprietors of the adjacent lands shall have a pre-emptive right in all grants made by the Corporation of the said city, or any lands under water granted to the said Corporation by this act."

Act of Feb. 2, 1826.

The next step in the Legislature upon this subject was an act of the 25th of February, 1826, in which the Commissioners of the Land Office were authorized to issue Letters Patent to the Mayor, &c., extending the right to four hundred feet from low water mark, from the point of termination in the act of 1807, along the Hudson River to Spuyten Devil Creek; and along the East River, from the point of termination fixed in the same act, to the Harlem River.*

By an act of April 13, 1826, it was provided that Tompkins street, along the East River, as laid out and approved by the Mayor, Aldermen, &c., shall be the permanent exterior street on the East River, between Rivington and Twenty-third streets; and East street on the said river, be-

* Appendix, Note 33.

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tween Grand street and Rivington street, as laid out and approved as aforesaid, shall be the permanent exterior street as so laid out and approved; and that all grants made, or to be made, by the said Mayor, Aldermen and Commonalty, shall be construed as rightfully made to extend thereto; and that all the provisions of the act entitled "An act to reduce several laws relating particularly to the city of New York, into one act," passed April 9, 1813, the several acts amendatory thereof, and in addition thereto, shall be construed to apply to said Tompkins street and East street.

The second section of the act of the 25th of February, 1826, thereby amended, was repealed.

Act of March, 1828.

On the 31st of March, 1828, an act was passed, extending West street from its then northerly termination, to its intersection with a continuation of the Great Kill Road, now Gansevoort street.* This was in pursuance of an application by the Common Council. A report to that effect was made in January, 1828, which will be found in the Minutes of the Corporation for that month.

In 1830 there was the further statute, before noticed, regulating West street, from Albany Basin to Battery place.†

Law of 1837.

And again, in the year 1837, another statute established the Thirteenth avenue, as a new exterior street, from Hammond to One Hundred and Thirty-fifth street.‡

Law of 1846.

And lastly, by an act of May 13, 1846 (Laws, p. 334), the Eleventh avenue, which, by the act of 1837, terminated southerly at Nineteenth street, was extended to Seventeenth street; and Eighteenth and Nineteenth streets were carried from their westerly termination to the easterly line of the Thirteenth avenue.§

Ordinance of 1844.

A very important change in the system of the Corpora-

* Appendix, Note 34. † Note 35. ‡ Note 36. § Note 37.

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tion was adopted in 1844. By an ordinance, dated the 22d of February, in that year, for the redemption of the city debt and payment of the interest thereon, it was provided, that in all cases of grants thereafter to be made of land under water on the shores of the Island of New York, or on the shores of Long Island, and within the limits of the various charters of the city of New York, and in all cases of extensions of grants previously made, it should be the duty of the Comptroller and Street Commissioner of the city of New York, to report to the Commissioners of the Sinking Fund, what sums of money should, in the judgment of said Comptroller and Street Commissioner, be charged as a consideration for such grant; and if the said Commissioners, or a majority of them, should agree to the terms reported by the said Comptroller and Street Commissioner, then the said Comptroller should be, and he was thereby, authorized to cause such grants to be issued to the grantees who might be legally entitled to the same.

Law of May 13, 1845.

By an act of the Legislature, passed May 13, 1845, for creating a public fund or stock in the city of New York, to be called the Croton Water Stock, and in relation to the Sinking Fund of such city, it was provided, that the above-mentioned ordinance, and any ordinance that might thereafter be passed by the Corporation of the city of New York, in conformity with the provisions of said act, and relative to the Sinking Fund, aforesaid, should not be altered without the consent of the Legislature first had and obtained, except by setting apart and appropriating to and for the purposes of said Sinking Fund additional revenue, whenever the said Corporation should deem proper; and that the said ordinance should remain in full force until the whole of the debt created for the introduction of the Croton water into the city of New York should be fully redeemed.

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The clause in the ordinance of 1844, that the grants should be made to those who should be legally entitled, meets the case of those parts of the soil granted by the statutes of 1807 and 1826, before noticed, in which a pre-emptive right is given to the adjoining owner.

The principle of the change is, then, an assertion of the right of the Corporation, in all cases of new, or of the extension of old grants, within the four hundred feet, to sell the property, and not to exercise any right, if they possessed any, under the statute of 1798, as re-enacted.

By an act of April 17, 1860 (Sess. Laws, 1860, chap. 516), the State Engineer and Surveyor were authorized to cause an actual survey to be made of all the space of ground and soil of the Hudson and East Rivers, which has already been, in whole or in part, reclaimed and filled in, either by natural accretion or otherwise, and which lies outside of and adjoining the grants made to the Corporation of the city of New York, under the Montgomery charter, granted to the said city on the 15th January, 1730, or by any other charter or grant to the said city from the State, and to make a return of such survey to the Commissioners of the Land Office.

The Commissioners were authorized to grant a release to the Mayor, Aldermen, &c., of all the interest of the State in and to the land so surveyed, or any part thereof, and in and to any claim, or right of action in favor of the people of the State against the Corporation for the use and occupation thereof, upon such terms as the Commissioners shall deem equitable, in view of the expenses incurred by the Corporation, its grantees or lessees, in redeeming such lands and improving the same.

The lands acquired by such act were to be deemed pledged to the Sinking Fund for the redemption of the

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debt of the city, and the Comptroller was to take charge of the same.

The grant was not to impair the right of any one holding a lease from the Commissioners of the Land Office.

The Comptroller was empowered to compromise and purchase the claims of any one to the lands.

The maps and surveys made by the State Engineer and Surveyor, under this act, are of the highest importance. They will leave very little of disputed subjects between the State and the city, as to the extent of the rights of the latter. It is on file, in the Surveyor-General's Office, Albany; a copy ought to be kept in New York.

The results, as to the difference of ground between the ordinance line of 1796–98, and that of the charter of 1730, is shown in the following abstract, with which Mr. Childs has kindly furnished me:

COMPARISON OF THE AREAS EMBRACED BETWEEN THE ORDINANCE LINE OF 1798, AND THE 400 FEET LINE OF 1730.

The areas between these two lines, or inside and outside of the ordinance lines, have been calculated from distances measured on the map, from which the following general results appear:

EAST RIVER.		HUDSON RIVER.	
Between the ordinance and charter lines, inside the ordinance line.	Between the ordinance and charter lines, outside the ordinance line.	Between the ordinance and charter lines, inside the ordinance line.	Between the ordinance and charter lines, outside the ordinance line.
Acres.	Acres.	Acres.	Acres.
18	$8\frac{52}{100}$	$2\frac{50}{100}$	$23\frac{23}{100}$

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Thus showing that along the East River the ordinance line of 1795–6 embraced an area greater than that of the line 400 feet from low water mark, as authorized by the charter of 1730, by..... $9\frac{48}{100}$ acres.

And that along the Hudson River the ordinance line embraced an area less than that of the charter of 1730, by..... $20\frac{73}{100}$ acres.

Or on both rivers, the area embraced by the ordinance line was less than that included within the 400 feet line, by..... $11\frac{25}{100}$ acres.

The total area on both rivers covered by the 400 feet line, as stated in the Montgomery charter, was..... $209\frac{50}{100}$ acres,

or thereabouts; and the area covered by the ordinance line on both rivers, ascertained as before stated, is ..... $198\frac{25}{100}$ acres.

One question has been suggested, growing out of this difference. The quantity of land beyond and within the 400 feet, upon both rivers, differs about eleven acres. There is so much less ground, within the limits of the ordinance. It has been suggested, whether the operation of the act is not to supersede the four hundred feet line entirely, and to substitute the lines of the statute of 1798, the State giving one parcel, and the city surrendering another.

It strikes me, however, to be the better opinion, that this could not be the effect. The charter gave a vested absolute right to the four hundred feet. This could only be relinquished by grant, release, or extinguishment. There is no trace of any conveyance. To work an extinguishment, the fact of an exchange, by way of compromise, or otherwise, should, in this case, be very plainly established and authenticated. It does not appear to me, that

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there is anything in the petition of the Corporation, or the act itself, legally justifying the conclusion of a relinquishment of title.

From the provisions of the charters and the acts of the Legislature, it results:

1st. That the right of the Corporation to the land under water to the extent of four hundred feet from low water mark, from Bestaver's rivulet (about the foot of Charlton street), to the foot of Marketfield street, and the right to the same extent of four hundred feet from Whitehall to the point designated on the north side of Corlaer's Hook, rests upon the charter and the colonial act of 1732, with such confirmation as they may have received from the constitution of the State, or acts of the Legislature.

2d. That the same right to four hundred feet on the Hudson River to the north of Bestaver's rivulet (about Charlton street), for the distance of four miles, is conferred by the act of the Legislature of April, 1807; and to this grant the right of pre-emption in the owners of the adjacent land is attached.

And by the same act, the same right is conferred from the point fixed in the charter, on the north side of Corlaer's Hook, for two miles northerly along the west shore of the East river, with the same pre-emptive privilege attached.

3d. That under the act of the Legislature of 1826, the same right to the like extent of four hundred feet is granted on the Hudson River, from the point at which the four hundred feet of the act of 1807 terminates, up to Spuyten Devil Creek; and also on the East River, from the point at which the two miles granted in the same act end, up to the commencement of the Harlem River. Under this grant also, the right of pre-emption belongs to the owners of the adjacent ground.

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4th. The operation of the act of 1837, in relation to the Thirteenth avenue, is to give the same rights and privileges to the holders of grants made before the act, as they possessed under the law in force at the time of their grants for any additional extent of soil under water.

Estate and rights in and to the four hundred feet

Having finished the statement of the charter provisions and legislative action which confer, or are connected with, the right and estate of the Corporation to the four hundred feet, it is now proposed to notice the leading questions growing out of the subject, and the legal position of the Corporation in relation to it.

The extent of the grant along the North River was from what is now known as Charlton street to Marketfield street, now Battery place. The grant, it will be noticed, excepts the rights of those who, under former grants, had the privilege of docking out below low water; and also has an exception that a space of forty feet was to be left at the extremity, with a power to the government to erect batteries upon it.

With these modifications, an entire estate, in fee, was conferred by the charter; and as if to exhaust language to "effect a perfect transfer of property, the power is given to fill up, wharf, or lay out every part thereof, and to build upon and make use of the same, in such manner as they and their successors shall see fit."

Acts in relation to the four hundred feet.

The acts of the Corporation in the exercise of their right of property to this space under water, may be classed under the heads of the erection of wharves and piers, the laying out of streets, and grants to individuals.

1st. With respect to wharves and piers, the system was almost universal for the Corporation to take a covenant that their grantees should erect them. In some cases, however, they built the piers themselves. Thus the pier on the western side of Coenties slip, known formerly as

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the Albany pier, was built by the city. This was before 1755, and in or after 1728. The pier is laid down on Marschalke's map of that year, and not on that of 1728, and it is recited as belonging to the city, in the grant to A. & F. Van Courtlandt, of 1772.

This subject will be more appropriately entered into under the title of "Wharves and Piers." (*Post.*) It is only necessary here to notice that the right to build piers appears to have been limited to the four hundred feet below low water after the grant, and to low water before it.

2d. *Streets.*—A brief notice of some of the acts of the Corporation, in relation to the streets, laid out below high water, will be found useful.

In 1687, a resolution was adopted to sell a parcel of ground in lots, from Coenties slip to near Old slip, and the grantees were to make a street in the rear, of thirty feet wide. When the sale was made, it was ordered that the street to be made by the lots lately sold from Burger's path to Martin Clock's, should be called the Dock street. This is now Water street.

In 1739 it was ordered that Alderman Roome, &c., calling to their assistance the Surveyor, be a committee to make a survey and draft of a street to be laid out at or near high water mark on Hudson's River, from the lot late of Charles Sleigh to the lot of Gerardus Comfort, and make their return, and report with all convenient expedition.

So in that series of grants of soil, between North Moore and Broad streets, in 1772–3, which convey the land as far into the river "as the right of the Corporation extends," there was a covenant to make a street, forty-five feet wide, at a certain distance from Water street, and next a street forty feet wide, at the extremity of the grant.

Along the Hudson River, three streets were laid out between Marketfield street and Albany basin, called First,

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Second and Third streets. Each was to be forty feet wide. First street is stated to be at high water, and Second street is taken as the line of low water. The east side of each of these streets was intended. The west line of First strset was nine feet east of the east line of Greenwich street, at Marketfield street. From the west line of First to the east side of Second street, was one hundred and thirty feet. The block from Second to Third street was one hundred and twenty feet; and the whole distance from the east side of First to the west side of Third street was three hundred and seventy feet; and the distance from low water mark into the river, of the outer line of Third street, was two hundred (200) feet. Greenwich and Washington streets were opened under an act of the Legislature of 1784, appointing commissioners for that purpose. The effect of opening these streets was to close Second and Third streets entirely, and to throw First street into Greenwich street, from Albany basin to a point a little south of Rector street. But at Marketfield street, the east line of Greenwich street ran to the west of the west line of First street; and thus the latter street became at that point entirely closed.

It is unnecessary to pursue these details further. It is clear that every street which, down to 1796 the Corporation had laid out or projected below high water, was within the limit of the four hundred feet.

The absolute character of the right of the Corporation to the four hundred feet was recognized in the case of Whitney *vs.* The Mayor, &c., which was finally determined in the Court of Appeals. The right absolute, and in fee.

The case was this:

In 1772, the Corporation granted to Eve Provost (similar grants of adjoining land were made to Hendrich Rutgers) a piece of ground "between high and low water

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mark, near what is now Pike slip, between that and Market slip, containing in length from high to low water mark two hundred and five feet. This was described as "opposite to the ground of the said Eve Provost," of course, upland, and as "fronting the East River at low water mark, fifty feet."

Eve Provost covenanted to make a street or wharf on the inner side of this grant, contiguous to her ground (the upland), of forty feet in width, noted, and called on the surveyor's plan, Cherry street; and another good wharf or street, of forty-five feet width, on the outer part of the water lots thereby grranted, called on the plan Water street; which were to be upheld and maintained by her at her own cost. So being maintained, they were to remain public streets and wharves for the use of the inhabitants and all others, in the same manner as the other streets. The Corporation only covenanted that they had good right to convey and for peaceable enjoyment.

On the same day (9th September, 1772), the Corporation made another grant to Eve Provost, "bounded northerly by a street on which the ground of Eve Provost fronts, called Water street, southerly by the East River or harbor, being, in length, two hundred feet; in width, forty-eight feet."

The grantee was to build a street or wharf, of forty feet in breadth, "on the outward part of the water lots hereby granted, next to the East River."

She was to keep it in good repair, &c., and it was to remain an open public street for the use of all, in the same manner as other streets of the city.

The Corporation covenanted, that she, &c., "fulfilling the covenants on her part, should peaceably enjoy the premises free from any let or hindrance by them, or any one under them; and that in consideration of her main-

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taining the said street and wharf, she should have and enjoy all wharfage, cranage, benefits and advantages growing from the said wharf fronting the East River to be erected, or by or from any landing places thereon to be built, or by or from any part thereof."

To understand the question decided, the following facts should be noticed. The grant extended two hundred feet from what the court consider to be low water mark, viz.: the south side of Water street. South street occupied forty feet of this two hundred, and thirty feet more were added. A bulkhead was then directed to be built on the exterior side of South street, of thirty feet in width. Whitney constructed this bulkhead, or a large part of it, in front of his forty-eight feet of front. Then the Corporation directed a pier to be run out forty feet wide from the bulkhead, two hundred and fifty feet into the river. This pier abutted upon a part of the bulkhead, opposite to Whitney's possession; and, of course, interrupted the access of vessels to so much of it.

By the form of the action, trespass, the question distinctly turned upon the exclusive right of the Corporation to the place. The question of indirect damages did not arise.

The court first declare that the question on the bill of exceptions was as to the admissibility of the testimony as to the value of the use of the wharf, and this depended on the establishment of a title to the bulkhead, and his right to use it as a wharf.

Next, that the land extending from low water mark for four hundred feet into the East River, was conveyed to the Corporation of the city of New York by the Montgomerie charter.

That the right of the crown of Great Britain to make grants of land covered by navigable waters had been ques-

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tioned, and the point was mentioned, though not much discussed by counsel on the argument of the cause. The question was ably argued in the case of Rogers *vs.* Jones (1 Wendell, 237). The learned Judge then quotes part of Justice Woodworth's opinion in that case, and adds: "In the case of Rogers *vs.* Jones, the patent from the colonial governor conveyed, within the boundaries which it described, the whole of the harbor of Oyster Bay, which was a navigable water; and it was held that it was a valid conveyance of the land under the water, and vested the title thereto in the patentees. A principle of the common law laid down and sanctioned by such jurists as Chief-Justice Hale, Baron Coneyn, and Judge Blackstone, should be considered as settled."

"There are many titles to valuable property in this State, which are based upon the power of the Crown; and since our Revolution, of the State government, to make these grants of land covered by navigable water; and it would be productive of incalculable mischief to overthrow, or even cast doubts upon them."

The Judge then said: "There was no evidence to show that common low water mark was, at the date of the Montgomerie charter, above the southerly side of Water street. That street is described in the water grants to Provost and Rutgers, as the outward part of the lots which extended to low water mark."

"The four hundred feet below low water mark included the land from Water to South street; the site of South street, including the bulkhead, which is two hundred and thirty feet below Water street, and the land upon which the pier was constructed. That the Corporation acquired perfect title to the whole, and still retain it, unless it has passed from them to the plaintiff." The Corporation having a clear title to the land, and due authority from the

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Legislature to construct the pier, such pier was neither a public nuisance, nor a purpresture, and they were not liable to the plaintiff for constructing it, unless they directly invaded his property, or interrupted the enjoyment of his rights.

The court held, that the proprietors of lots did not, by filling up the intermediate spaces, or making the street, acquire any title to the street or wharf. The policy indicated by the act of the 7th of March, 1798, and from which probably it was not intended to deviate in the act of 1813, was, that the Corporation should be the absolute proprietors of the streets. But whoever was to become the proprietors, it is clear that, as it was designed at the time that what is called the bulkheads should be met by the pier, it could not be supposed by either party that it would ever be used as a wharf. That part of the street and the pier were built pursuant to the same ordinance of the Common Council; and the two works were prosecuted and finished together.

The judgment of the Court below was reversed. That judgment was, that the plaintiff had a right to the wharfage of the fifty feet of the bulkhead which was covered by the pier, and that his title thereto had not been extinguished by anything done by the defendants.* The reversal decides that the plaintiff had no such right, or that it had been extinguished. The action, we are to remember, was trespass, involving the right of possession.

Statute of 1798.

The leading and most important questions relating to the property in the four hundred feet arise out of the grants of the Corporation in connection with the statute of 1798. There are some judicial decisions besides that in Whitney's case, and some professional opinions upon this subject.

* This case is not reported in the regular Reports. The opinion of Mr. Justice Strong was printed by the Corporation Attorney.

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Mayor vs. Scott.

In the case of the Mayor of New York *vs.* Scott (1 Caines' Rep., 543), it is observed, with regard to this, as follows:

"The lands which the Corporation of New York, under their charter, hold on Manhattan Island, and within the city, extend to low-water mark, and four hundred feet beyond that into the East River. The Corporation having granted away the whole of the land to which they were entitled, under the charter, applied, in April, 1798, to the Legislature for an act to authorize them to run streets and wharves of seventy feet width in front of the water lots already granted. This, by a law of that month and year (re-enacted on the 3d of April, 1801), was granted by the Legislature. In pursuance of the authority granted by this act, the Corporation laid out a street, called South street, in front of the lots they had granted, joining the East River."

It was also held, in this case, that the Corporation did not take the soil under water beyond the four hundred feet, by force of this statute; and, therefore, that it was not entitled to slippage for the use of the space left between two piers erected by individuals under the act and ordinance. The ordinance reserved the slippage, and was held void.

Some observations on this case will be found hereafter.

Opinion of Judge Talmadge, 1839.

A very elaborate opinion upon this right was given by Judge Talmadge, to the Board of Aldermen, in the year 1837; an abstract of which is given in the note.*

Furman vs. Mayor, &c.

In the year 1851, the case of Furman *vs.* The Corporation came before the Superior Court of New York.† The material facts and questions were these: Gabriel Furman, the ancestor of the plaintiff, acquired title, in the year 1785,

* Appendix, Note 36. † 5 Sandf. Rep., p. 16.

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to a lot of ground, known as No. 20, on a map of that and other lands. That lot was described as follows: "Lot number twenty (20), bounded northerly on Crown Point street, westerly by lot number nineteen (19), southerly and easterly by the East River."

The East River boundary here is at high water mark.

On the 24th of July, 1804, the Corporation made a grant to G. Furman, of a water lot, described as follows:

"All that certain water lot, vacant ground, and soil under water, situated on the southerly side of Water street, between high water mark and a certain new street, intended to be made, fronting on the said East River, called Corlaers street, and a certain other street, made and intended to be continued in the said river, called Front street, opposite to other land of the said Gabriel Furman, at the point of land called Corlaers Hook, heretofore known by the name of Crown Point. Bounded northerly, in part, by Water street, and partly by the land of the said Furman, at high water mark; easterly, at low water mark, by the said intended new street, called Corlaers street; southerly, by the said intended new street, called Front street; and westerly, in part, by other land of the said Furman, and partly by other vacant ground or lot number nineteen (19); containing in breadth, on Water street, and also on the said intended new street, called Front street, seventy-five feet each, and in length, on each side, one hundred and thirty (130) feet each, more or less."

There was a covenant, on the part of Furman, to make Front street fifty feet wide, and on the part of the Corporation, that he should have all the wharfage and cranage growing or accruing "by or by reason of the several wharves or streets intended to be made on the easterly or southerly side of the premises granted, called Front street and Corlaers street."

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On the 20th of October, 1845, the Common Council passed an ordinance, directing that the Comptroller, with the assent of the Commissioners of the Sinking Fund, offer to the legal representatives of G. Furman a grant of the land under water, in the East River, bounded easterly by Corlaers street, and southerly by South street, and situate in front of the land granted to him in 1804, at a valuation to be determined on, in accordance with an ordinance of the Corporation, of February 22d, 1844; and in case such legal representatives should refuse or neglect to accept of such grant, within fifteen days after they have received such offer, the Comptroller was to make such grant upon the same terms to such other person or persons as should be willing to take the same."

Furman's heirs having neglected to take the grant, the property was sold to another.

The bill was then filed for the purpose of restraining the Corporation from making the grant to any other person, and that the title of the plaintiffs might be established.

The Court determined the case upon the following propositions:

1st. That the Corporation was the absolute owner, in fee, of the land under water, the four hundred feet granted by the charter. That the king was, by common law, seized in fee of all lands under the navigable waters of his realm, and entitled to grant and convey them. He has the property *tam aquæ quam soli.* By grant or prescription, the subject may have the interest in the water and soil of navigable rivers; and that this grant of four hundred feet had been held to be valid by the highest authority, citing Mayor of New York *vs.* Whitney, in the Court of Appeals.

2d. That the intervening space, from Front to South street, being thus the property of the Corporation, the

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plaintiffs were not the nearest owners opposite to such street to be made. The land of the defendants intervened. The plaintiffs could not be compelled to fill up the space, and of course were not entitled to it.

3d. That another and more serious objection to the plaintiffs' claim was, that by their construction of the act, glaring injustice would be done both to proprietors and the Corporation. If the government could compel the riparian owners to fill up the space, when the land so claimed would be equivalent to the expense, they might also require it when such value would be no compensation, but the expense be ruinous.

On the other side, it would take from the Corporation all the estate conveyed to them by their charter of the soil under water, or, at best, allow them to hold it merely as trustees for the riparian owner, until the street or wharf should be made.

4th. The point, that the act of 1798 was passed on the application of the Common Council, is then considered, and the petition analyzed. The Court conclude that the application was only made for relief in the cases in which the Corporation had exhausted their whole four hundred feet by grants; that they asked for nothing against riparian proprietors, or against persons whose grants did not exhaust the four hundred feet, but only against their own grantees, whose grants extended to the full limit of their property.

The preamble of the statute is also analyzed, and the conclusion drawn, that it has no reference to owners of land on the shore, or to any other proprietors but those whose lands ran out to the full extent of the four hundred feet.

5th. And hence, that the Corporation only applied for an act relating to cases where the right of the city had

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been fully granted, and the intervening space, arising from the sinuosities of the shore, was therefore the land of the State; and this the parties were to fill up.

The strong argument of the Court against any original right in riparian owners will be afterward noticed.

This case of Furman *vs.* The Mayor, &c., was carried to the Court of Appeals, where the judgment was affirmed. (6 Selden, 507.) The Court held that a riparian owner of land bounded on tide water is limited by high water mark. Beyond this, the land under water, including the shore, or bank to high water mark, belongs to the public, and, at common law, to the king, as *parens patriæ*. To the extent of four hundred feet from low water mark, the land under water in the East River, in front of the lot of the appellants' testator, was vested by the charter in the Corporation, and confirmed by the Constitution of 1777.

That the conveyance by the Corporation to Furman, in 1804, extending to Front street, transferred nothing but what was included in the boundaries. There was no covenant which prevented the Corporation from using the residue of the land in front in the river in any way they pleased. They had the same rights as any other owners.

That it was clearly shown by the learned Judge, who delivered the opinion of the Court below, that Furman did not come within the sections of the act cited, having no land on South street. The 220th and 221st sections (2 R. L., 420,) are the sections referred to.

Many difficulties having occurred to the author's mind as to the accuracy of some of the views of the learned Judges in the opinions and decisions referred to, a minute examination has been made as to the extent and nature of the grants, by the Corporation, of water lots prior to 1798, in order to interpret and explain the statute. The results will be of considerable utility in other respects.

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The grants of the Corporation, prior to 1798, are of two classes. Classes of grants before 1798.

1st. Where they convey soil under water within the limit of the four hundred feet.

2d. Where they comprise the whole right of the Corporation to the whole four hundred feet.

The legal presumption, that the Corporation would not attempt to grant beyond their actual right of soil, is not weakened by the fact of two exceptions, hereafter noticed.

Again, the exterior streets, West and South, were laid out in relation to the four hundred feet, as follows:

1st. Where the whole street was within the line.

2d. Where a portion of the street was within, and a portion beyond the line.

3d. Where the whole street was beyond the line.

And the exterior streets (West and South), in relation to the grants, were as follows:

1st. Where they were laid out some distance beyond the extreme limit of a grant.

2d. Where they were in part within that limit so as to take a portion of the land granted.

3d. And where the inner line of the street commenced at the termination of a grant. I do not find a case of the street being laid entirely within the limits of a grant.

In examining the line of the exterior streets in connection with the grants, prior to 1798, and the right of the Corporation to the four hundred feet, these results appear to be established. In connection with streets.

On the North River, I do not believe that a single grant can be found before 1798, which is not considerably within the four hundred feet; and I doubt if there is a single place between Marketfield street and Bestaver's Rivulet, at which West street, as laid out under the ordinance of 1796 and on Magnin's map of 1804, is not within the same limit.

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Again, I conclude, that along this river, there was no grant which came up to the inner line of West street as there laid out. In every case there was a space (and a part of the four hundred feet) between the grant and the street. The proofs of these positions are stated in the note.*

But along the East River, the grants are by no means of so uniform a character. The details of an examination of numerous grants and maps are stated in the note,† and the following appear to be the results.

At the most westerly section, that between Whitehall and Moore streets, the whole of the grants, except at the corner of Moore street, were within the four hundred feet.

From Moore street (east side) to Broad street, on its western side, and from Broad street to Coenties slip, I deduce, from a minute examination, that the grants either ran up to the extent of the four hundred feet, and a street of forty feet was to be made AT the extremity of the grant, and then, in laying out South street, thirty feet was added; or else the grants covered four hundred and forty feet, with a covenant to make a street, forty feet ON the extremity; in which case the forty feet was taken, and thirty more for South street. In each case four hundred feet only was actually conveyed. The right to make so much of the street on the land of the State was assumed, and the act of 1798 ratified.

The same was the case from Coenties slip to Old slip.

From Old slip to Coffee House slip (foot of Wall street), the grants included the whole four hundred feet, and the street was laid out at about thirty-five feet beyond the limit.

The extent of the grants and line of low water, between Coffee House slip (Wall street) and Maiden lane, is

* Appendix, Note 39. † Note 40.

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established with more than ordinary precision; and it appears that South street, on the east side of Wall street and on the west side of Maiden lane, is some distance beyond the line of the four hundred feet.

At Crane wharf, and between Peck slip and Beekman slip, there was a space of about one hundred and forty-six feet between the end of the prior grants and the inner line of South street, clearly part of the four hundred feet.

At the south-westerly side of the grant to Bames, it would seem that the four hundred feet had not been exhausted.

And lastly, at the terminating point of the ordinance of 1796 (Corlaers Hook), and for some distance to the west of it, there had been no grant whatever, except to high water mark.

In fact, therefore, the Corporation had not exhausted their four hundred feet on the North river in a single case; nay, West street of the map and ordinance was within that limit for probably its whole extent; certainly for the greater part of it. In every part of the line, the intermediate space was the soil of the Corporation.

On the East River, for a considerable extent of the line, the grants fell short of the right of property, and there are not many cases in which there was a space between the limit of the four hundred feet and the inner side of South street; in other words, any intermediate space belonging to the State.

The proofs of these positions will be found in a note.*

With these facts before us, the decisions and opinions before noticed are to be examined.

Remarks upon the cases.

The decision in the case from Caine's Reports was undoubtedly correct, because the slippage accrued from using waters covering ground clearly belonging to the State;

* Appendix, Note 40.

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but the statement, that the Corporation had by these grants exhausted their whole right, is incorrect, and must be understood that they had exhausted it at that place, and at some other points along the line.

While the opinion of Judge Talmadge is chiefly directed to the suppport of the proposition, that the owners of upland had no right to the spaces up to the street—and while in one part of his argument, he appears to treat the act as applying only to spaces where the soil belonged to the State—yet I apprehend he means, that the statute would apply to the case of a strip, part of the land of the Corporation, as much as it was the land of the State, where water-lot owners claimed.

The decision in Furman's case proceeds chiefly upon the ground, that the statute applies only to cases in which the whole four hundred feet had been granted away, and the street as laid out was a certain distance from the outer end of the grant, leaving a strip belonging to the State, to be filled in.

The first proposition of the Court, that the plaintiff (and of course others similarly situated) was not the owner nearest the street, if the intervening space was within the four hundred feet, because that space belonged to the Corporation, is open to the difficulty that the intermediate spaces were almost entirely the property of the Corporation, and were, upon every reasonable construction, contemplated by the Corporation and Legislature; and then the remark of Judge Talmadge, that it was preposterous to suppose that the Corporation asked for power to compel themselves to fill up the space, will apply with force.

But a legal objection to the leading view of the Superior Court and of Judge Talmadge has occurred to me, which after much reflection I am unable to overcome. How can an act be constitutional which compels the owner of a pre-

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viously acquired piece of land to fill up and improve the ground of another, though it is given to him as a compensation? It is, in truth, compelling him to become a purchaser, at a price too, not regulated by his own choice, but fixed by the current cost of the work, if he does it himself, or by what the Corporation shall pay, if he refuse or neglect it. It is true that the Court of Appeals, following the masterly argument of Mr. J. C. Spencer, has settled the principle, that an owner may be assessed for a special benefit accruing to his property by reason of a public improvement, in addition to his share of any tax for it, which the public is to bear. But in these cases the owner acquired his property under and subject to this existing law, and it is carried into effect by an estimate of the amount made by a constitutional tribunal, a Board of Commissioners. It is also true that there are traces, in colonial legislation and ancient ordinances of the Corporation, of the principle of making each owner construct or repair a highway or street opposite to, and coextensive with, his own line of property bounded on it. Here again is a direct burthen imposed by law, and attendant upon the acquisition of the property. Such cases are far from establishing this principle of a compulsory purchase, growing out of a statute, passed after a party's acquisition.*

And if there is any force in these views, they are as fully applicable to the case of land owned by the State as to land owned by the Corporation. The Superior Court press the argument with irresistible force as against the Corporation, and in connection with land belonging to it. They fail to apply it, as it clearly must be, with the same cogency, to land of the State. That the Corporation, for the attainment of its own purposes, may, as the agent of the State, compel the purchase of land of the State, is the

* Appendix, Note 41.

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same thing as to authorize it to enforce a purchase of its own property. The argument is as forcible in the one case as in the other.

It appears also to be a necessary conclusion, that where the Corporation has no power to compel the filling up of an intermediate space, the nearest owner can have no right to such space; and that the converse of the proposition is equally true.

Test the statute, in its application to anterior grants, by the cases along the North River, near Marketfield street. The grantees took two hundred feet from low water mark, with an obligation to make two streets, one (Third street) on the extremity of their grant. By the ordinance of 1796, the new exterior street (West street) was laid out, with its inner line forty-six feet beyond the western line of Third street; and this space, therefore, belonging to the Corporation, would be the space to be filled.

Supposing the right to be indisputable, of building a street at the expense of the owners, in proportion to their front upon it, I cannot discern a sound principle upon which the owner can be obliged to take property and make a new front, and build a street further into the river at an additional cost. If, in the example given, the space had belonged to the State, the objection is precisely the same. The State could authorize the Corporation to do in this respect what it could do itself; and nothing more.

It must be concluded, I think, that these provisions of the statute would be void and unconstitutional, if sought to be applied to grants made prior to its passage; and it is a sound presumption that it was not intended to apply to such, unless the enactment admits of no other construction.

To what, then, can it apply? The answer, I think, is plain.

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The memorial speaks of the streets being laid out *at and on* the extremity of grants theretofore made, or *thereafter to be made;* and the statute refers to an exterior street *to be* agreed upon.

The prior grants, as has been seen, had, in some cases, the exterior street *on* their extremity; that is, within the line of the grant, though reaching its outer end; in other cases, *at and on* such extremity, being partly within, and partly beyond it; in other cases, exactly *at* the extremity, the street commencing where the grant ended; and in other cases, *at* such extremity in a larger and less accurate sense, viz.: with some space beyond the grant before the street commenced.

The Corporation anticipated a similar, though not so extensive a diversity in future grants. Ordinarily they would make the grant correspond with the street; but two cases might arise—one of a grant by definite limits in feet, which, from accident or mistake, did not come up to the outward street; another, of a change in the line of the street after a grant subsequent to 1798. Yet, in all such cases, it was essential that there should be a covenant to make South or West street; or at least, the grant should plainly refer to one of those streets as the exterior street to be made, and profess to extend to it. Then, if, from the causes adverted to, there was an intervening space between a water lot so granted after 1798, and such street, the proprietor would be bound to fill it up, because the statute entered into and made part of his agreement.

And as to all antecedent grants, the statute was of great importance. The memorialists express a doubt whether they can compel any of the proprietors "of the lots fronting thereon (that is, on the streets to be made) to make such streets in any reasonable time to be fixed."

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The difficulty was, that there was no coercive power adequate to the necessity of the case, that is, to make the street. The covenants in the former grant were the subject of an action; but this did not build the street. The petitioners then asked for remedies (and the statute conferred them), by which the object was to be effectually and summarily obtained.

Thus, then, in the case of grants made before 1798, of lots fronting *on* the street to be made, the petition and the statute were only for additional remedial powers. Where the lots did not front the street, but the owners accepted the ground, which the Corporation state they were willing and had determined to grant to the adjoining owners,* these remedial provisions of the act would apply.

The declaration of the Corporation in the grants to Moore and Murray, referred to in the note, and made in 1796, is important in explaining the object of the Corporation and intent of the Legislature. They recite the laying out of South street, by which the street of fifty feet had become unnecessary, and that they had agreed with the proprietors, along the line, to extend their lots. They then gave Moore the forty feet in fee, and twenty-six feet more.

Where such additional ground was not accepted, the statute did not apply. The Corporation could not compel the proprietors to fill up the intermediate space, nor to make the outward street under the covenants; and of course the owner could have no correlative right to the soil upon filling up such space.

The Corporation, we should notice, never asked for a power to coerce the filling up of these spaces. They asked for a clear and stringent authority to enable them, as well

* See the cases of grants to Moore and Murray, in 1796, as stated in Note 40.

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against the owners under prior, as those under future grants, to accomplish the work which such owners were or should become legally obliged to perform.

It may be said that the Common Council have asserted the right of compelling proprietors, under former grants, to fill an intermediate space belonging to themselves; and it may be, that there are instances of ordinances involving this assumption. I have not, however, found such a case in my examination. Generally speaking, the offer would be so readily accepted as to prevent any question arising. For example, on the 11th of February, 1835, the Corporation ordered the owners of lots, between Pike and Rutgers street, to make South street; and the owners adjacent and opposite to fill up the intervening spaces. The grants to Eve Provost, Rutgers and others, of 1772, covered this line of property, and here there was no such space at all; South street occupying the forty feet covenanted in the old grants to be appropriated for an outward street, with thirty feet added.

Yet it is not improbable that in some cases the Corporation may have applied the statute to grants made prior to 1798. A few such instances would scarcely be sufficient to prove even a claim, much less be decisive of an interpretation. The form proper in the case of subsequent grants might have been used without adverting to any difference, and usually would be readily complied with.

But I have never met with an instance of the unequivocal assertion of the right to require the filling in, from parties holding under grants prior to 1798. On the contrary, the general course of the Corporation has been, to make grants of the strip thus formed to the adjacent owners, on their application for a price to be paid. This has not been done on the basis of a right, as riparian owners, to such strip, but upon principles ably set forth in a report

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by the late Edward Taylor and the present Judge Ingraham, made to the Board of Aldermen in 1838.*

The report shows that the Corporation claimed the absolute right to use and dispose of the property as it thought proper, and that offers to the adjoining owners of water lots were made on the grounds of propriety and justice, without recognizing in them even a pre-emptive right.

And the action of the Corporation in 1845, in relation to the strip between Walnut and Corlaers street, is in exact conformity with the principle and view of the statute now taken.

The ordinance of the 20th of October, 1845, directed that the proprietors of the several grants of lands, under water, in the East River, fronting on South street, between Walnut street and Corlaers street, should build, in front of their respective grants, a wharf or street, of the width of seventy feet, called South street; and also that the said proprietors respectively should fill in with good and wholesome earth, or other solid materials, within the lines of their respective grants, the space lying between the said streets or wharves so to be built, and the replanned or regulated lots along the shore of the East River.

The grants along this line were all after 1798.

The memorial of the Corporation and the act of the Legislature may be thus analyzed.

The Corporation represent, that upon laying out a new exterior street, a space was, in some instances, left between the limit of their prior grants and the inner line of such street. That in such cases they were willing to give the soil for the street—and ask that, if they should agree with prior grantees to give them the strip, the remedies which the State might confer should apply. The cotemporaneous acts warrant this construction.†

* Appendix, Note 42.

† See grants to Moore and Murray, 1796, Note 40.

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Next, that in future grants bounded by South and West street, or with covenants to make such street, there might, from mistake or a deviation from the then adopted line, be such a space; and that the remedies should be given in this case also.

But where the owner, under a prior grant, would not accept the land upon condition of filling it up, there the case remained subject to the rules of law arising from the covenants in the lease or grant, and from general principles.

Thus interpreted, the statute becomes merely a proffer, to the nearest owner, of an opportunity to make the acquisition. If the space is the property of the Corporation, that body and the owner must mutually agree to it. If the space should be the property of the State, the statute is the agreement on the part of the State; but it requires the assent of the owner before the act can bind him. Thus, if the owner avails himself of the offer, he acquires the title to the land of the State by filling up the space and making the street, and the Corporation cannot defeat this right. They only prescribe the time when the work must be done. If the proprietor neglect or refuse to take the space, then the statute enables the Corporation to fill it up, and gives a lien upon it for the expense; and then the act of 1798 and 1801 permitted this lien to be enforced as if it were a mortgage, no doubt by foreclosure and sale; and the act of 1820 gave the ordinary remedy by advertisement and sale; so that in any event the improvement would be made. But then we are to reject, as illegal and invalid, all the personal remedies given for the collection of the money.

Thus far as to the land of the State. And, as to the spaces which were the land of the Corporation, the statute is substantially this: that if the Corporation think proper

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to grant such space, and the nearest owner to accept it, then he becomes bound to fill it up and make the street, and becomes liable to the provisions of the act—the consideration being the acquisition of the ground.

Still, in every case, it is a matter of compact. If the Corporation do not choose to make the offer, they may fill up their own property as they think fit. If the nearest owner do not choose to take the space, he cannot be compelled to do so. And what the Corporation cannot enforce against an owner, the owner cannot demand of the Corporation.

So far, then, as the land of the State is concerned, the statute is based upon the pre-emptive principle, giving to the adjacent owner the first privilege of acquisition. So far as the land of the Corporation is affected, the statute is an authority that, in case that body offer the pre-emptive privilege, and it is accepted, the act shall apply, and they may order the completion of the work in their discretion.

And to this view the strong argument of the Court in Furman's case, as to the incredibility of the supposition that the Legislature meant utterly to give the right of the property in the four hundred feet, is strictly applicable.

It is obvious that, upon the principles now submitted, the case of Furman against the Corporation could not admit of a doubt. The grant of 1804 did not extend to, bound upon, nor in the least degree refer to South street. It was simply a grant bounded on Front street, when South street had been laid down in the ordinance far beyond; and the intermediate space was the absolute property of the Corporation, unaffected by any covenant with Furman. It would be almost absurd to say that he could be compelled to fill this space, or, therefore, could have a right to demand it. Unless the doctrine of riparian ownership gave him the property, he could have no title. A

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claim on that ground, it is presumed, is wholly untenable in our State. The decisions in the Court of Errors, in the Court of Appeals, and the judgment of the Superior Court, have entirely overthrown it.

In Nott *vs.* Thayer (2 Bosworth's Rep., Superior Court, 10), the space between high and low water was, as before stated, termed the tideway; and questions were discussed as to the effect of the different circumstances which an ownership of such tideway, or of upland without it, would have upon the power to grant the four hundred feet, or part of it.

One case is very simple. If the Corporation remain the owners of the strip of tideway, interposed between the four hundred feet and the adjacent upland, the owner of the latter has the right to an offer of the grant. It is senseless to suppose that the Corporation, as owners of the tideway, were included as owners "of adjacent lands."

If the owner of the upland has received a grant of the contiguous tideway, his right is equally clear; in any view, his claim is superior.

But suppose a grant of the tideway adjacent to a strip of upland to a third party; then a proposed grant of part of the four hundred feet. Who has the pre-emptive right? The Judge at Special Term thought that the upland owner was entitled to such a right, even in the case of a transfer of the tideway to a stranger. Such grantee took only what the Corporation had in reference to the upland owner, and the transfer could not supersede such owner's right. But when the upland owner's demand had once been satisfied, then the owner of the tideway, or of portions of the four hundred feet—whoever was found such owner at the time of the proposed grant—was entitled to the four hundred feet, or any remaining portion of it.

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Mr. Justice Slosson, at General Term, was inclined to adopt these views; the two other learned Judges were not prepared to do so; and considered that the point was not necessarily before them. Certainly the question is one of nicety.

The legal character of the right.

The subject of the dominion over and the right of property in land under water, along the shores of the sea, and the banks of navigable streams, is one of the highest importance. The rights of the Crown—the rights of Parliament—the rights of State Legislature, and the control of the United States—the privileges of adjacent owners, and those of the public at large, are involved. In practical operation, the questions arise in connection with right of fishing, of navigation, of docking, bathing, and of the pre-emptive right, as well as in some other particular modes. It is proposed to examine the position of the law with us: *first*, by seeking to point out what was the common law; *next*, what is the law in our own State; and *lastly*, as both illustrative and useful learning, the law in the sister States.

The king, by the settled doctrine of the common law, was the source of title to all the lands of the kingdom. The original proprietorship was considered to have been in him, and the right of every subject to have been derived from him.

This theory of ownership comprehended all the bed of the narrow seas, all the shores of the seas or navigable rivers, and, of consequence, all the soil, which, by natural or artificial means, was reclaimed.

Navigable rivers or waters were those subject to the flux or reflux of the tide, and the space between high and low water mark was as much part of the royal domain as any portion of the bed of the stream.*

* Appendix, Note 43.

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Necessarily attendant upon this right of property, was the right of transfer; and such right was exercised in general by an absolute transfer of soil—by a license to erect docks or other improvements for the benefit of trade—and by granting an exclusive right of fishing in particular places.*

The patents and grants of royal governors were in the colonies as effectual to convey a title to all that the Crown could grant, as if executed by the king himself, and were governed and construed by the same rules.†

It has, however, been strenuously insisted, that the right of alienation by the king was restricted by *Magna Charta* and other statutes; and not only so as to prevent the king from making a grant of a fishery in severalty, but from making any absolute transfer of the soil under water.‡

Whatever may be the law elsewhere, or the strength of the reasoning sustaining this view, it must be regarded as the law of New York, that no such restraints were imposed by *Magna Charta*, or otherwise, upon the kingly power.§

That the right of fishery, in severalty, might have been granted by the Crown, and, of course, may be by the State, is definitely settled in the State of New York. But, without such express grant, a riparian owner has no other or greater right than other citizens to fish in such waters.‖ Nor is there any exclusive right of bathing vested in the owners of the adjacent shore.¶

Again, if the right of the Crown to make an absolute grant of land under water were as doubtful as (in the State of New York at least) it is clear, yet the right of

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* Appendix, Note 43. † 22 N. Y. R., 44.
‡ Note 44. § Note 44. Note 44. ¶ Note 45.

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Parliament and of the State to do so is almost undisputed, and is certainly the law.*

Now, the argument has been before repeatedly urged, that the colonial act of 1732 was a confirmatory or new charter, adopting by reference every grant of the former charters. If that argument is as unanswerable as it appears to the author to be, then the Corporation hold their right to the soil between high and low water, and to the four hundred feet, under a grant equivalent to an act of Parliament.

And I apprehend that, in the State of New York, the riparian owners have no right, without special grant or license, to dock out or use the soil under water, even from high to low water; nor even a right of pre-emption, unless specially granted.†

Yet the title and right which was in the king, or his grantee, was not wholly unrestricted; and that which now exists in the State is not so. It was subservient to a fundamental rule, that the Crown could not use the land under water, nor, of course, confer such power upon another, so as to interfere injuriously with the navigation of the waters.‡

What will amount to a serious detriment to navigation, is to be tested generally by an indictment of the erection as a nuisance. The authorities in the note will show in what manner this question has been treated by the Courts.§

But besides the redress afforded by an indictment for a nuisance in a navigable stream, a private remedy by an abatement may also be resorted to. The general rule is, that an abatement will be lawful wherever an indictment will lie.‖

There is also a series of authorities to show, that an

* Appendix, Note 46. † Note 47. ‡ Note 48. § Note 48. ‖ Note 48.

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injunction will be granted under special circumstances, particularly pending the criminal proceedings. The party must establish that he will sustain some peculiar individual damage, distinct from that which will fall upon the public at large.

The general law has also been applied in the action brought against the defendants, for negligently running their vessel against a building belonging to the plaintiffs. The chief defense was, that the building was below low water mark, and an obstruction to the navigation. This fact was proven, and the defense declared a legal one.*

I have added in a note a summary of the decisions in various States upon this important subject.†

It is in this mode that the right must be exercised by the king of Great Britain in subordination to public rights; not that he cannot make a valid transfer and title to the property, but only that he cannot do so when the grant would break up navigation, or seriously injure it.

Jurisdiction of Congress.

And so in our own country the public have a redress where a legislative authority is transcended in a grant. There might be a serious question whether any State tribunal could interfere with an obstruction in a navigable river, distinctly authorized by a statute, if nothing but State power bore upon the question. But even upon State legislative power there is one effectual restriction, arising out of the Constitution and laws of the United States.

The great case of Gibbons *vs.* Ogden (9 Wheaton) settled the principle, that an exclusive right to navigate the waters of a State, granted by its Legislature, was void, because it obstructed the trade and navigation of the citizens of the United States, as carried on under the Constitution and laws of Congress.

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* Gasey *vs.* Ellis, 1 Cushing's Mass. Rep., 306.

† Note 49.

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There is a valuable opinion upon this subject in a message of Governor Toucey, of Connecticut, vetoing an act of the Legislature of that State, establishing a bridge over the Connecticut river. The Legislature had chartered a company for the construction of a railroad from New Haven to the eastern line of the State, giving them power to erect a bridge over the river at Middletown. The city of Hartford was a port of delivery, established by act of Congress. It was at the head of sloop navigation. The tides of the ocean ebb and flow there, and from thence to the mouth of the river its waters are navigable by vessels engaged in the foreign and coasting trade.

By an act of Congress of 1799, Hartford and other places above the proposed bridge were established as ports of delivery; and the registered vessels of the United States (with an exception), and all coasting vessels duly licensed, were authorized to proceed thereto, and unlade their cargoes.

Governor Toucey states the question to be, whether the Legislature of Connecticut could grant to a corporation the power to interrupt the navigation, by vessels of the United States, between a port of delivery and the sea.

He proceeds: "It will be admitted on all sides, that an act of the State, prohibiting vessels sailing under a coasting license from proceeding to a port of entry or delivery, established by act of Congress, would be in conflict with the laws of the United States, and would be utterly void, for want of power in the State to pass it. If such an act should prohibit the passage of such vessels, not totally, but partially, as for example for half a day, it would be equally void, &c. It is not the extent, but the fact of the conflict, which avoids the legislation of the State."

"If the law of the State conflict but little, and therefore be not void, that little might be repeated, until the action

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of Congress was entirely subverted. If one bridge but partially obstructs the navigation, and may therefore be permitted, then a second and a third bridge may be constructed; and by the same process of reasoning, the whole river may be encumbered with bridges from the port of Hartford to its mouth, till the navigation is broken up and rendered impracticable."

"The question, therefore, presented to the General Assembly upon this charter, must be: will this bridge, with its numerous piers in the bed of the river, be an obstruction to this navigation? One would suppose that the question would be readily answered by any person having a general knowledge of the character and commerce of the Connecticut river."

"It is hardly possible to suppose that this bridge, with its piers in the bed of the river, and its train of cars passing perhaps hourly upon it, and passing still more frequently as time advances and business increases, should not be such an obstruction."

The Legislature disregarded the message and passed the bill. It was, however, subsequently repealed.

The case of The State of Pennsylvania *vs.* The Wheeling Bridge Company (9 Howard, 649) bears upon the subject. An injunction had been moved for on behalf of the State, at the instance of her Attorney-General, stating that the Ohio River being one of the navigable waters, leading into the Mississippi, is, and hath been for a long time, an ancient, navigable and public river, and common highway, free to be navigated by the citizens of the State of Pennsylvania, as well as by all other citizens of the United States. The bill set forth the nature of the erection, the statute of Virginia under which it was constructed, with the provision that, if it proved an obstruction, it might be abated as a nuisance. The prayer included a prayer for an injunction.

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Justice Grier, in the Circuit Court, refused the injunction, without prejudice.

1st. Because the question of the plaintiff's right to prosecute was new, and involved the jurisdiction of the Court. If the State of Pennsylvania was not entitled to prosecute, the Supreme Court could have no original jurisdiction.

2d. The injury threatened was not imminent and certain, but contingent; and, on the 1st of December ensuing, the Court could be moved to grant an injunction.

The order directed that the papers be filed with the clerk of the Supreme Court.

In December term of 1849, an order was entered—that on the motion for an injunction in this cause to remove the obstruction of the navigation of the Ohio River, as charged in the original, amended and supplemental bill of the complainants, it be referred to Chancellor Walworth to take further proofs.

Two questions were to be inquired into :

1st. Whether or not the bridge mentioned in the pleadings is or is not an obstruction of the free navigation of the River Ohio, at the place and by vessels propelled by steam or sails, engaged, or which may be engaged, in the commerce or navigation of said river.

2d. If an obstruction as aforesaid shall be made to appear, what change or alteration in the existing condition of the said bridge, if any, can be made consistent with the continuance of the same across the river, that will remove the obstruction to the free navigation of the vessels aforesaid, engaged in the commerce and navigation of the said river as aforesaid.

The referee reported that the Wheeling Suspension Bridge, referred to in the pleadings, was an obstruction to the free navigation of the river at the place where it was erected, &c., following the order. And he also concluded that it was practicable to alter the construction of such

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bridge in the manner pointed out by him, so that it would cease to be such an obstruction.

In January term, 1852, the Court decided that the bridge was a nuisance; that to abate it required its entire removal, or an elevation to the height of one hundred and eleven feet above high water mark. The sufficiency of a draw and other measures, to remedy the evil, and prevent the abatement, were suggested; and the Court sent the examination of the matter to an engineer, to report upon before the decree or abatement should go into effect.

In May, 1852, the report came in, and the judgment was, that a draw of the width of two hundred feet was necessary, to prevent the bridge being a nuisance.

The cause has not yet been finally disposed of. See Note 48.

Without presuming to state, as rules, propositions which have not received judicial sanction, we are safe in assuming that the right of the people of the other States, under the Constitution and laws of the United States, are coextensive, and no more, with the rights of the people of this State under their own system.

The power, then, is in the State Legislature to make and sanction grants which operate as an abridgment of the extent of the common right of navigation. *Prima facie*, it is to be presumed, that the grant thus made is not an unwarrantable encroachment upon such public rights, but a proper exercise of authority for the very purpose of aiding and improving trade and navigation. The tribunals of the United States, on behalf of other States, or citizens of other States, can interpose whenever this authority is unduly exercised. Our own tribunals may do so on behalf of our own citizens, or of those of other States; and the question of nuisance is to be determined upon the same principles, and all the remedies open to the one class are allowed to the other.

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There is one consideration, of no little importance, to be borne in mind upon this subject. If Congress has not exercised its power of regulating commerce in a particular place, the action of the State Legislature is valid, as far as the powers of Congress are concerned. Thus, in Wilson *vs.* The White Creek Marsh Company (2 Peters' Reports), it was held, that a navigable creek or arm of the sea might be entirely closed by a dam, under legislative authority, Congress not having exercised its power in relation to it. It would seem a sound conclusion that Congress must act upon navigable waters of the State, in the situation in which it finds them. It could not, therefore, establish a port of delivery in waters once navigable, but then closed up, nor compel the demolition of the obstruction erected.

The case of Pollard's Lessees (3 Howard's S. C. Rep., 212) established, "that the title to the soil under navigable rivers vested in the several States, and not in the United States."

The new States had the same right and sovereignty as the old, and Congress have, therefore, no power to grant land in Alabama which was below high water mark when Alabama was admitted into the Union.

A very important case, connected with this subject, was determined by Judge Woodbury (2 Woodbury & Minot's Rep., 401), The United States *vs.* The New Bedford Bridge. See also Warting *vs.* Clark (5 Howard U. S. R., 441, and Williams *vs.* Beardesly, 2 Carter's Ind. Rep., 591.

SECTION IX.

WHARVES, PIERS, AND SLIPS.

Historical notices.

The earliest record connected with wharves and piers in the city, which I have been able to trace, is one dated in

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1654, when Daniel Litchoe, tavern-keeper, was authorized to build a dock on the strand.

There is a sketch of New York upon Colton's map of 1837, dated in 1654. I have examined the original in the State Library, at Albany. It is on the margin of a map of the province, called *Totius Neo-Belgii Nova Tabula Amsterdolami*, 1654. One copy is colored. There is on it the plain trace of a wharf or pier, about the foot of Whitehall street, at the extreme southerly point of the shore.

On the map of 1695, there is laid down a dock at the foot of Whitehall street, and to the east of it; which undoubtedly was the old dock frequently mentioned in ancient proceedings of the Common Council. There is a pier running into this dock, marked on the map as the bridge. It occupies about the present site of Moore street, and may be assumed to be the "bridge into the dock," spoken of in Dongan's charter.

So on the maps of 1728, of 1746 and 1755, we findthe bridge similarly laid down; and we find the northern end of the dock corresponding with about the present line of Water street.

There was a grant from Governor Nichols, made on the 4th of April, 1671, to Nicholas Davyes, which recited, that the latter was possessed of two lots of ground in the Smyth's valley, without the water porte of the city, lying between Abraham Ver Plank's and Lambert Clamp's; and that he had applied for liberty to erect a wharf by the water side, as near the low water as should be most convenient. The grant was of free leave and liberty to erect and build a convenient wharf at the water side, of what breadth he shall think best, within the space of the front of his two lots—always provided that the erecting the said wharf shall in no way stop up or be prejudicial to the highway, which is to remain of good breadth and convenient

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for carts and passengers. (Book in office of Secretary of State, marked Court of Assize I., p. 328.)

The Smith's valley appears to have been from the foot of William street, Old slip, to about Beekman street. By an ordinance of 1694, made on the nomination of the Governor, the street running from Burgher's path to the farther end of the Smith's Fly, by Alderman Beekman's, was to be called Queen street.

On the map of 1695, the present Pine street is called King street. In 1695, Cedar street was Smith's street.

And on the map of 1695, we find a dock (No. 125), marked as the New Dock, and beginning at a point opposite the foot of Wall street (the Water Porte).

This was doubtless built under the grant of 1671. There was an ordinance passed in 1660, which recited that the Burgomasters had received permission from the Director-General to take a certain sum from shippers and owners for the erection of a pier for the accommodation of the inhabitants, &c.

On the 6th of September, 1686, an ordinance was passed to survey all the vacant land within the city, near and in the dock, and beginning from the Weigh House street to the City Hall.

On the map of 1728, we find the Weigh House (marked No. 24) on the south side of Dock street (Pearl), nearly opposite the Custom House. The street was called, at that place, Custom House street, in the grant of 1732.* Weigh House street, as shown by the grants of 1732, was the present Moore street, and on the map of 1695 we see what is termed the bridge (88), running into the old dock, just about the location of Moore street.

The City Hall, or Stadt House, stood, as shown on the map of 1695, on the northerly side of Dock street, at the

* Appendix, Note 40.

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corner of what is now Coenties alley, opposite the head of Coenties slip; so that the line within the ordinance of September, 1686, was from Moore street to Coenties slip.

It then provided, that the said vacant land should be laid out in lots of eighty feet long into the dock, and twenty-four feet in width.

Again, an ordinance was passed in August, 1687, that the ground from Conrad Ten Eyck's to Martin Clock's be laid out in lots and sold.

Sales were made accordingly, and reported by the Mayor.

The space from Conrad Ten Eyck's (Coenties slip) to Martin Clock's (Burgher's Path), now Old slip, was divided into eleven lots, of twenty-four feet, front and rear, and ninety-five deep.

In October, 1687, a grant was made to Conrad Ten Eyck, of one of these lots at the eastern corner of Coenties slip, describing it as ninety-five feet in depth, from the Dock street to the East River, the boundary on the south; and in 1697 a further grant was made of thirty-six feet, which has for its southern boundary the wharf or street at low water.

So in April, 1687, a grant was made to John West, of the lot on the corner of Old slip, describing it as all that piece or parcel of land, abutting upon the East River; bounded on the east by the slip or passage that leads into the East River, known by the name of the Burgher's Path; north by the street or highway; west by land of the Corporation, undisposed of; south by the river or road, being forty-eight feet front *at* rear, and in length from the said street as far as the low water mark, as the same is surveyed, &c.

On the 12th day of September, 1688, it was ordered that the street to be made by the lots lately sold, from

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Conrad Ten Eyck's to the Burgher's Path, be called Dock street wharf, now Water street. This was from Coenties slip to Old slip.

Division of subject.

The subject may be examined under two heads.

1st. The powers of the Corporation in establishing wharves, piers, and slips.

2d. The regulations of such wharves and piers.

1st. It appears very clear that, under the charter of Dongan, the Corporation had no right to wharf out or build a pier below low water mark; nor, under that of Montgomerie, more than four hundred feet beyond it; nor, I apprehend, can a case be found of their attempting to go beyond it, with one marked exception in 1795, afterward noticed.

I have before observed that the Corporation appear to have considered that they had full right to four hundred feet, provided they caused forty feet at the extremity of the four hundred feet to be filled up and wharfed, for the purposes of government.

Charter 1686.

The charter of Dongan (1886) recites that the citizens and inhabitants of the city had erected and built (among other things) the bridge into the docks, the docks or wharves, with their appurtenances. The grant is (§ 2) for the bridge in the dock, the wharves, or docks, &c.

We are to notice that the grant in this charter was to low water mark around the island; and the fourteenth section authorized the Corporation to fill up the said lands, and to make use of and build upon the same, in any manner or way, as far into the river as low water mark.

Charter of 1730.

The 37th section of Montgomerie's charter grants all the right, benefit, and advantage of all wharves, docks, cranes and slips, or small docks within the city, with the wharfage, cranage, and dockage, and all rents, issues and profits arising from the same, saving to all other persons their respective titles in and to the same.

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The grant of the four hundred feet, contained in the 38th section, gave also full authority, at any time, to fill up, make, wharf and lay out, all and every part thereof. It has also this provision, that nothing therein should authorize the Corporation to wharf out before any persons who had prior grants of keys or wharfs below low water mark, without their actual agreement or consent.

Provided also, that of the wharves to be built or run out, there shall be left, toward the East and North Rivers, forty feet deep, as well for the greater convenience of trade, as to plant batteries thereon in case of necessity.

Act of October, 1691.

The act for regulating the buildings, streets, lanes, wharves, docks and alleys of the city of New York, passed 1st of October, 1691, recited, that the city of New York, the metropolis of this province, was chiefly erected by the inhabitants thereof, for the propagation and encouragement of trade and commerce, and the good, benefit and welfare of their majesty's subjects within this province, and forasmuch as it is very necessary for traffic and commerce that the buildings, streets, lanes, docks, wharves and alleys of the city, be conveniently regulated with uniformity, for the accommodation of inhabitants, shipping, trade and commerce.

The act then provided, in the first section, for the appointment of surveyors or supervisors of the buildings, streets, wharves, and docks of the city; to see that the same be regulated with uniformity, according to such rules and orders for laying out streets, lanes, wharves, and docks, as should be established by the Common Council, who were authorized to make such rules and ordinances for the better regulation, uniformity, and gracefulness of such new buildings as shall be erected for the inhabitants; and also, for such streets, lanes, wharves, and docks as shall be found convenient for the good of the inhabitants.

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By the second section, the Common Council was empowered to *obstruct* (remove) any building which might narrow any street—they might continue the street called Broad street according to its present dimensions; "and if in the doing thereof, or in the laying out for the future any streets, lanes, docks, wharves, alleys, &c., they take any person's grounds, the Mayor, &c., shall issue a warrant to the sheriff, to impannel a jury to assess the damages and recompense to be awarded to the owner, and others interested. The verdict, with a judgment of the Court, and payment, or tender and refusal, shall be binding upon the parties, and shall authorize the Mayor, Aldermen, &c., to cause the ground to be taken for the purposes aforesaid."

This act gave authority to the Common Council to lay out and establish wharves and docks within the limits of the city, and to take the necessary land under water whenever it was required, and which belonged to others.

The charter of 1686 had given ample power to the Corporation, in the 14th section, to makes wharves or docks down to low water, where the land was their own; that is, where it had not been before granted. But this statute of 1691 enabled the Corporation to build such wharves by taking the land under water, which had been granted previously.

The system pursued by the Corporation, from 1686 to 1730, was generally to make a grant of the soil, and a covenant to make a wharf *on* the end, and sometimes *at* the end of the line of the grant.

A number of these grants will be found stated or referred to in the note.*

And after 1730 to 1798 there was no grant made, extending beyond the four hundred feet, with the two

* Appendix, Note 40.

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exceptions stated in the note just referred to, and with the further exception that sometimes the grant covered four hundred and forty feet, the forty feet to be built as a street or wharf. Nor within that period can there be found the case of a pier stretching beyond the four hundred feet. I have before adverted to the Albany pier, which ran the furthest into the river, and was constructed in 1750; and this, according to both Hill's and Rutzen's map, did not reach up to the line of the four hundred feet.

The charter of Montgomerie cannot, I think, be construed as giving a right to wharf out or build piers beyond the four hundred feet.

There is, however, an opinion of Judge Troup, given to the Corporation in February, 1805, which at first sight appears to lead to a different conclusion. He adverts to a former opinion, given on the 19th of May preceding, in which he had said that the Corporation of the city had a right of jurisdiction at least, as far as low water mark, over the land covered with water, and opposite to and adjoining Powles Hook.

Wharves having been erected within those limits, without permission of the Corporation, his opinion was asked as to the best mode of vindicating the rights of the city, and especially if it was necessary to obtain a grant of the soil for that purpose. He observes that the remedies open were: 1st. A special action on the case. 2d. An information for intrusion.

As to the first remedy, he says that the terms of the charter appear to vest the Corporation with the exclusive privilege of determining when, where, and in what manner wharves shall be erected within its jurisdictional limits. That this privilege was interesting to the commerce of the city, to protect which, is among the principal objects of the charter.

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After showing the insufficiency of the remedy by an action on the case, he recommends an application to the Attorney-General to proceed by information.

It may, however, be noticed that, in order to justify the Corporation of New York in interfering with the attempt of others to erect wharves or piers, it is only necessary to hold that they are conservators of the rivers by force of their jurisdictional power. As such they might well have the right to prevent others from building such works, although they could not erect them themselves, except within the limits of their actual right of soil.*

Act of April, 1787.

The next statute of importance was that of April 16, 1787; the act "for regulating the buildings, wharves, and slips in the city of New York."

The first section of this act varied but little from that of the act of 1691, before stated. The second and third sections were also the same, with some necessary changes, caused by the Revolution.

The sixth and seventh sections were new. They do not relate, however, to wharves or piers. The first, second and third sections are set forth in the note No. 57, which shows also their successive re-enactment in the law of 1801, and in that of 1813.

Act of 1798.

In this historical account of the legislation upon this subject, we now arrive at the important statute of 1798; before considering which, a brief reference to the preceding action of the Corporation will be useful.

The line of South street and of West street, as laid down in the ordinances of 1795–96, was in several cases entirely upon the land of the State. The space thus taken was called a street or wharf, as the outer part was to serve for the unlading of vessels. In other cases, the street was

* See Tern *vs.* Ash, 10 Barn. & Cres., 349. *Ex parte* Newport Marsh Trustees, 16 Simons, 346.

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partly upon land of the State, and partly upon that of the Corporation; and in others, especially upon the North River, it was almost wholly upon the land of the latter. (See map Surveyor-General, 1860.)

And after the adoption of the line of South street, and on the 4th of May, 1795, an ordinance was passed, that the proprietors of water lots, between Whitehall and Coenties slip, be allowed to make five piers, each one hundred feet from the *east* (quere south) side of the seventy feet, or permanent line, as agreed upon and laid down in a survey of the east side of the city.

I have before observed that two grants of the Corporation, viz.: one to John Moore and one to John Murray, were made in 1795 and 1796, of a strip of ground beyond the limit of the four hundred feet; as also that a considerable part of South street was established beyond such limit.

This was done, either in anticipation of obtaining the sanction of the Legislature, or it was subsequently discovered that such sanction was essential; and the statute of 1798 was thereupon passed. The same observation applies to this license of 1795 to build out piers. I believe there is no trace of a claim to build piers beyond the four hundred feet, except in this instance.

This statute of 1798 was the first in which the Corporation was empowered to erect piers, extending into the rivers beyond the four hundred feet. The piers under this act, being to run from the outer side of the exterior streets, ran generally, but by no means always, entirely upon the soil of the State.

When the street was in whole or in part on the land of the State, the first section of the act of 1798 was a grant of the power to establish it, not a grant of the soil.

So, when the street was on the land of the Corporation,

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but the pier was in whole or in part upon that of the State, the nature of the right was the same.

The several sections of this act connected with the subject of piers, slips, and wharves, are transcribed in the Appendix, Note No. 50.

The fifth section empowered the Corporation to direct piers to be sunk and completed in front of the said exterior streets or wharves, at the expense of the proprietors of the opposite lots; and, if they refused or neglected, the Corporation might do the work itself and take the wharfage. The only other section, connected with piers particularly, was the seventh, which provided that no building of any kind or description, other than such piers or bridges, should at any time be erected on such streets or wharves, or between them respectively, and the river to which they shall respectively front or adjoin.

The next statute was that of April 3d, 1801. The first section is, with some changes of language, identical with the first section of the act of 1787.

Act of April 3, 1801.

The fifth section of the act of 1708 was renewed, with slight verbal changes, in the seventh section of this act of 1801.

A new section was introduced in the act (the eighth), authorizing the Common Council to grant, to the owners of lots fronting the streets (West and South), a community of interests in the piers, to be sunk in front of such streets within such limits as the Corporation should deem just.*

The seventh section of the act of 1798 was renewed on the tenth of this act of 1801. This prohibited the erection of any building on the streets or wharves, except such piers.

Act of 1803.

By the first section of an act, passed April 2, 1803 (§ 267 of 1813), the Mayor, Aldermen, and Commonalty, in Common Council convened, were authorized (among other

* Appendix, Note 50.

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things) to make and pass such by-laws and ordinances as they shall from time to time deem necessary and proper, for filling up, altering and amending of all public slips in such city, at such times and in such manner as they shall think proper.

And by the fourth section of the same act, it was provided, that in all cases where the by-laws of the Corporation should require anything to be done in respect to the property of several persons, or in filling up, altering or amending any of the public slips, an estimate and assessment of the expense of the work should be made, in the same manner as is by law directed with respect to the paving or regulating the public streets; and where the same shall relate to *the filling up, altering, regulating or amending* the public slips, one-third of the expense shall be borne by the said Mayor, &c., and the residue by the persons in the vicinity who may be benefited thereby.

This act was originally to last for three years. By the statute of 1806, it was made permanent; and the above provision was finally re-enacted in the 269th section of the statute of 1813.

The system of assessment directed in the act respecting the pavement, &c., of streets, was prescribed in the eleventh section of the act of April 3, 1801, renewed in the 175th section of the act of 1813. It is the ordinary method of appointing assessors to make an equitable assessment among the owners or occupants of houses and lots intended to be benefited.

The law remained in this situation until the act of April 2, 1806.* The first section of this statute empowered the Corporation, at their own expense, to cause piers to be sunk and completed in such places and manner as they should think proper, between the Whitehall slip and the

Act of 1806.

* Appendix, Note 50.

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east side of Exchange slip, so as to form a basin for the accommodation of sloops and other vessels.

The next clause of the same section authorized the Corporation, at their own expense, to cause such and so many other public basins to be formed and completed in the said city, as they may deem necessary for the trade thereof; and to take to their own use the slippage or wharfage arising from the same, any law or custom to the contrary notwithstanding. "Provided that nothing therein contained should be construed to deprive any persons, who may have made piers by direction of the Mayor, &c., in pursuance of an act entitled 'An act for regulating the buildings, wharves, streets, and slips in the city of New York' (act of 3d of April, 1801), of any legal right which they may thereby have acquired, or to interfere with any private property, or right, or privilege, held under grants of the said Mayor, Aldermen, and Commonalty, or otherwise."

The second action of this act was also new. It provided that in all cases where the said Mayor, Aldermen, &c., shall think it for the public good to enlarge any of the slips of the said city, they shall be at liberty, and have full power so to do; and, upon paying one third of the expense of building the necessary piers and bridges, shall be entitled not only to the slippage of that side of the said piers which shall be adjacent to such slips respectively, but also to one half the wharfage to arise from the outermost end of said piers. By the third section, in case any of the persons, who, according to the said above-mentioned act (the act of April 3d, 1801, recited in the first section), shall have been directed to sink or complete piers and bridges in the said city, have neglected, or shall neglect to comply with such regulations, it shall be lawful for the said Mayor, Aldermen, &c., to grant the right of mak-

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ing such piers and bridges, and the right of receiving the profits thereof to any person or persons, in fee or otherwise, upon such terms as they shall think proper.

By the fifth section, a notice was directed to be given to the proprieters of lots, of the directions of the Corporation for sinking and completing such piers and bridges.

This is copied verbatim, in Note 50, and forms the subject of future examination.

All the clauses of these several statutes were re-enacted, with some few alterations, in the law of 1813. The correspondence of the various sections will be seen in the Note No. 50, where the sections, as now in force, are transcribed, and their first and successive enactments stated.

Act of April, 1830.

An act of April 16, 1830 (Sess. Laws, 242), empowered the Common Council to designate and appropriate, by laws or ordinances, such of the public wharves, piers, or slips, of the city, as they might deem expedient, and such private wharves and piers in the said city as the owners thereof might apply to have so designated or appropriated, for the exclusive use of steamboats, or of any other class or description of ships or vessels; and to restrain and prohibit any ship, steamboat or other vessel from coming into, or lying, mooring or anchoring at or within any wharf, pier or slip of the city, except such as may be so designated for their use respectively; and to impose such penalties as they may think reasonable for the violation of such ordinances.

By another statute, passed April 20, 1835 (Sess. Laws, 1835, p. 107), the Corporation was authorized to order that the water near and adjoining any private wharf, pier, bulkhead, or land within the city of New York, be deepened, by excavating or removing the earth, &c., therefrom. The expense was to be estimated and assessed upon or among the owners of every wharf, pier, dock, or piece of

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land, water right or privilege, near or adjacent to which any such water may be so deepened, and which may in any manner be benefited thereby, in proportion to the advantages acquired thereby.

The powers of, and the course of proceeding prescribed to, the Corporation upon this subject may be examined under the following heads:

First. Of piers and slips, formed within the four hundred feet, or within the exterior streets of 1798.

Second. Of piers run out from such exterior streets, and the slips formed thereby.

Third. Of the extension of such piers and enlargement of slips and basins arising from the same.

It is first to be noticed, that the provisions of the statutes of 1798, 1801, 1803 and 1806, which, at the date of their enactment, were only applicable to West and South streets as then ordered to be laid out, are applicable to all the exterior streets subsequently authorized. This is very clear as to the extension allowed in the act of 1807, as the law of 1813 comprised all such enactments; and the 220th section was adapted and varied to bear upon every subsequent exterior street. Nor does there appear to be any reasonable doubt but that the same rule will apply to the extension granted in the act of 1826, as far as Spuyten Devil Creek on the North River, and Harlem River on the east.

First. As to piers, wharves and slips, within the four hundred feet, or within the line of the exterior streets.

The slips which were first made by the Corporation were formed by the improvement and extension of the natural indentations of the shore. This was especially the case on the East River. Whitehall, Coenties slip, Old slip and others were thus formed.

A bulkhead was first made at or about low water mark,

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and wharves were run from the ends of it into the rivers at various distances. The basins or slips thus formed were almost invariably made under covenants contained in the grants of water lots, made by the Corporation.

A number of such cases will be found in Note No. 40; but successive proceedings in relation to Pike slip, formerly Charlotte slip, will usefully illustrate this part of the subject.

On the map of 1782 and that of 1791, we find Catharine slip, at the foot of Catharine street, the same name being retained to the present time; and then George street and Charlotte street, to the eastward. Catharine slip appears to have run up to near Cherry street. Although neither George slip nor Charlotte slip is laid down on the maps of 1782 or 1791, they were contemplated and covenanted to be made, by grants dated in 1772.

Thus in the grant of September, 1772, made to Hendrick Rutgers, one of the parcels granted is described as lying between Catharine slip and George slip, with a covenant to make a firm wharf, pier, or street, of twenty-five feet in width, for the whole length of the lot, into the East River, viz.: two hundred and five feet from the north side of Cherry street.

But particularly another lot was granted between high and low water mark, between George slip and Charlotte slip, containing in length, from high to low water, two hundred and five feet, and twenty-six feet front and rear; being along the strand, and fronting the East River at low water mark, twenty-six feet; in the rear upon the ground of said Hendrick Rutgers, twenty-six feet; on the east, bounded by Charlotte slip, west by ground granted to Eve Provost.

A similar grant was made to Rutgers of a lot on the easterly side of Charlotte street.

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The depth of two hundred and five feet extended from the northerly side of Cherry street to the southerly side of Water street.

There was a covenant to build a wharf or street on the inward (northerly) side of the lots, described on Bancker's chart, which is referred to as Cherry street; also to build a wharf or street on the outward side, of forty-five feet. Also, to build a wharf, pier, or street, on the east side of the lot, granted for the whole length thereof, contiguous and adjoining said Charlotte slip.

By another grant, dated the same day, the Corporation conveyed a water lot to Rutgers, on the west side of Charlotte slip, running from the south side of Water street, two hundred feet into the river; and contained covenants to build a wharf or street, of forty feet wide, on the outward part of the lot, next to the East River or harbor, and a wharf, pier, or street, on the east side of the lot, twenty-four feet wide, along the whole length thereof, contiguous and adjoining to Charlotte slip. The grant embraced but two hundred feet from low water.

I have not ascertained the exact time when Charlotte slip was made from Cherry to Water street, but it was not carried further until 1810. On Goerck's map of 1795, the slip runs to Cherry street. In the year 1810, an ordinance was adopted for building wharves on the northerly and southerly sides of the slips, being from Market to Pike slip.

On the 18th of June, 1810, the Committee on Piers, Wharves, and Slips (S. Jones, Jr., chairman) made a report referring to this ordinance, and reporting, that the proprietors on the northerly side had complied with such ordinance, but not those on the southerly side; that the same could be finished at the expense of six thousand four hundred dollars, and that the opinion of the Recorder and Attorney

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of the Board was, that the case fell within the fifth section of the act of April 3d, 1801, entitled, "An act for regulating the buildings and wharves, &c.," whereby, on neglect to fill up the intermediate ground mentioned in the act, the Corporation might cause the same to be done on the owners' behalf, and charge and recover the same by distress, &c. The report was adopted.

It was not till the year 1836, that South street was made at this point; and the bulkhead which made it of course ran across the slip, which, by an ordinance, was directed to be filled up. (See Document No. 50, Board of Aldermen.) The Corporation conducted this work of filling up under the first section of the act of April, 1803, and the fourth section of the same act. (Sections 267 and 269 of 1813.)

The Corporation was charged with one third of the expense, and assessors were appointed, who assessed the residue upon various owners in the vicinity assumed to be benefited.

This assessment led to great and protracted litigation; the parties assessed insisting that the act was, in truth, the laying out of a public street, to which the filling up the slip was subordinate. The case terminated with a decision of the Supreme Court, in 1849. (The Mayor, &c., *vs.* Whitney.)

The decision is reported in 7 Barbour's Rep., 485. It was held, that the building the bulkhead across the slip, and filling the vacant space behind, in pursuance of the ordinances, was to be deemed the filling up of a slip, under section 267, of the act of 1813; and that the assessment was properly made, under the 269th section. And this, notwithstanding the effect of the improvement was to continue South street. The City had a general right to fill up slips, though not expressly given by the acts of 1798 and

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1813, beyond the then existing boundary of the City. It was no illegal assumption of power, if the exercise of this right resulted in making a street. The assessment upon the adjacent owners was properly made.

The action was commenced under a stipulation, entered into with other parties assessed, that their causes should abide the result of the one against Whitney. A history of the litigation will be found in Document 46 of the Documents of the Board of Aldermen of 1851. It went to the Court of Appeals, and the opinion of Mr. Justice Strong has been published by the Counsel of the Corporation. It was delivered in 1850.

The details of this case are given *ante*, Title, "Right to four hundred feet."

Another case, under the title of Whitney *vs.* The Mayor, &c., was also carried from the Supreme Court to the Court of Appeals.

In the Court of Appeals the judgment was reversed. Mr. Justice Edwards delivered the opinion. (1855.) He adverts to the distinction, in the statute of 1798, between piers built in front of lots, belonging to individuals, and piers which enlarged a slip. The reason was that slips were owned by the defendants. They had been originally formed by indentations of the shore, and had been reserved by the Corporation for public use. All the statutory provisions (1798, 1806, and 1813), in reference to the construction of piers, apply only to piers built outside of the four hundred feet. As to piers constructed within that limit, no legislative aid was necessary, for the charter gave full powers to fill up, wharf, and lay out every part thereof. The defendants had a perfect right to build the pier at Pike slip. The exercise of the power was not dependent upon the statute.

The learned Judge then puts the question raised, thus:

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"But it is said that the defendants have restricted themselves, by their covenants, from doing anything which shall interfere with the plaintiff's claim for wharfage." He construed the covenant to mean that the parties shall be entitled to the wharfage so long as the wharf shall continue to be the outer extremity of the city; that is, until the Mayor, &c., shall deem it necessary to use the land beyond it for the public good.

In 1772, the Corporation had granted to Hendrick Rutgers a lot of land under water, bounded north by Water street, west by land of Eve Provost, south by the East River, and east by Charlotte, now Pike, slip; being twenty-six feet front and nearly two hundred feet deep. The same day a grant was made to Eve Provost of property adjoining, being one hundred feet front and nearly two hundred feet in depth. Rutgers covenanted to make a wharf or street, twenty-four feet in breadth, on the east side of the lot conveyed to him, and adjoining Charlotte slip. Eve Provost covenanted to make a wharf or street, forty feet wide, on the outward part of the lot granted to her, next to the East River. There was a covenant that each of the grantees should have and enjoy all manner of wharfage and cranage, arising or accruing from the wharves to be made by them respectively. The plaintiff became entitled under these grants. A pier had been run out from the bulkhead, forming part of the outward boundary of South street, and was built by the defendants at their own expense. This pier covered fourteen feet of the bulkhead constructed by the plaintiff. He sued for damages, and the Supreme Court held that, as he was entitled to the wharfage upon the outer boundary of the lots so granted, and had been deprived thereof to the extent of forty feet, by the construction of the pier built by the defendants, he was entitled to damages for the injury sustained.

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The defendants had not bound themselves not to use the land outside of the wharf, and, even had they done so, such a covenant could not take away their right. . . . It was not in the power of any set of men, for the time being representing the Corporation, to take away or abridge its legislative authority. . . . The power to construct piers upon the land granted to them by the charter was a legislative power, granted for the common benefit of all the corporators.

The judgment was reversed.

In Ross *vs.* The Mayor, &c. (3 Wendell, 333), a bulkhead was ordered to be built in and across the slip or basin at the foot of Spring street, on the westerly line of West street, and that the space between the present bulkhead and the one to be built be filled in, under the direction of the Street Commissioner. It was held that the assessment should be made under the 269th section of the act of 1813, and the property in the vicinity belonging to the Corporation was equally liable to assessment as other property. This was besides bearing one-third of the cost. At the same time that the bulkhead was ordered to be built across Pike slip, the line of South street was ordered to be continued from Pike slip to Market slip; and a bulkhead was ordered to be run across Market slip, and the vacant space behind filled in, and also across Rutgers' slip, and the space behind also filled in, by certain days. (See Doc. Board of Aldermen, vol. 1, p. 575; Ass. 13, 1835; approved by the Mayor, May 8, 1835.)

Another case of the action of the Corporation may be usefully adverted to. In January, 1833 (Doc. Board of Assistant Aldermen, vol. ii., p. 443), the Committee on Wharves, &c., reported in favor of filling up Peck slip, and building a new bulkhead across it, on the south line of South street. They stated that the bulkhead which formed

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the head of the slip at Front street had been erected when the water was much deeper, and that the wash and other causes had gradually diminished it, so that it fell bare at low tide. They also reported that the expense of making the proposed alterations in Peck slip will, according to law, be borne, one third by the city, and two thirds by the owners of the property benefited, to be raised in the usual way by assessment. The resolutions reported and adopted were: 1st. That a bulkhead be built across Peck slip, on the southerly side of South street. 2d. That the sewer in Peck slip be extended, by a wooden truck, to the outside of the new bulkhead to be built, and that all the intermediate space between the present bulkhead and the southerly side of South street be filled up and properly regulated. 3d. That the Street Commissioner take the proper measures to carry these resolutions into effect.

So, on the 29th of June, 1807, there was an ordinance for sinking a pier on the south side of Partition street, of one hundred and eighty feet in length; the Corporation to contribute its proportion according to law, and a committee to confer with the proprietors as to the best mode of carrying it into effect.

Second. As to piers from the exterior streets.

The act of 1798, renewed in the 224th section of that of 1813, empowered the Corporation to run out piers in front of the exterior streets adopted by them, viz.: South and West, at the expense of owners of opposite lots. If such owners neglected or refused to do the work, the Corporation might perform it themselves, and take the wharfages.

The eighth section of the act of April 3, 1801, gave the Corporation authority to grant a common interest, in the piers so to be built, to the proprietors of lots fronting on the streets, within such limits as they should think just and proper. (§ 225 of 1813.)

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Then the third section of the act of April 2, 1806, authorized the Corporation, in case of refusal or neglect of the owners in front, to grant the right of making such piers and bridges, and the right of receiving the profits thereof, to any person or persons in fee, or otherwise. (Last clause of section 224 of 1813.)

And the fourth section of the same act of 1806 provided for the case of some of the owners refusing to build the piers in conjunction with the others; the Corporation might then join with such others in making the piers, and take the proportion of the wharfage. (§ 231 of 1813.)

The first observation to be made upon this series of provisions is, that the owners of the lots fronting the places of the intended piers were to have the first privilege of doing the work and acquiring the wharfage. It was upon their default that the Corporation obtained the right of making the piers, or of granting that right to others; and it was upon the like default, in some of the owners, that the Corporation might unite with the others, and perform the work and take the wharfage jointly.

This principle is distinctly asserted in the case of Scott *vs.* The Corporation (1 Caines' Rep., 543). Two piers had been run out, under the act, by owners of fronting lots, and it was held that the slippage arising from vessels attached to the piers could not be taken from the owners, even by an ordinance passed when the piers were authorized; the owner not being a party to such ordinance by any agreement. The Court say that the Legislature meant to give the owners the right.

Again, the lots referred to in the statute are undoubtedly the water lots fronting on the exterior streets. It may also be assumed that the word *lot*, here used, comprehends a strip, however narrow, lying between the exterior street and the outer line of the next inner street.

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If, however, the ownership of such a strip was divided, or if the Corporation owned still a space between the extent of their grant and the line of the exterior streets, it is presumed that the right is attached to the front portion of the lot. So that a lot under this provision means a strip running from the exterior street to the next inner street, or any section of such a strip.

Again. The Corporation, wherever they were proprietors of opposite lots, had precisely the same privilege and right as individual owners. They could build the piers at their own expense. The statute means, that they may call upon other proprietors to do the work, or refuse to do it; and, as proprietors, may do the work themselves, where they owned the ground to which the right was annexed.

And it is supposed that, wherever a public street ran down to the exterior street, a pier could be built exactly opposite to and not extending beyond its width, at the public expense solely. The pier at the foot of Sixteenth street, East River (July, 1841), and that at the foot of Twenty-third street, North River (Jan. 30, 1851), appear to be examples of the exercise of this right.

But to what lots was the first right of constructing piers attached by the statute? By that of 1798, it belonged in strictness only to the strip of ground exactly opposite to and of equal width with the proposed pier. The language is: "at the expense of the proprietors of the lots lying opposite to the places where such piers shall be directed to be sunk." It is obvious that this clause might give too great an advantage compared with the expense in some cases, and impose to great a burthen when the benefit was shared by adjoining owners, in other cases. The work might be, in these latter instances, at least retarded.

This no doubt led to the enactment of the eighth section

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of the act of 1801 (235 of 1813), enabling the Corporation to grant to the fronting owners a community of interest in the piers, according to the breadth in their lots, within such limits and under such regulations as they (the Corporation) should think proper.

The custom of the Corporation, when this provision has been pursued, has been to extend the limits to half the front between the proposed and the next pier.

A question has been suggested, whether this act makes it incumbent on the Corporation, when proceeding under the act of 1798, to give to others the community of interest in the proposed piers. It would seem to be a mere discretionary power lodged with them, and it would be difficult to say who, under the act, would be entitled to claim its exercise. I should suppose that, if the owner claims the original right given to him by the act of 1798, he is entitled to it. He has the first pre-emptive privilege.

Act of 1806, § 1. The next important topic I shall notice is, the construction and effect of the first section of the act of April 2, 1806. (§ 228 of 1813.)

After empowering the Common Council to cause piers to be sunk between Whitehall slip and Exchange slip, to form a basin for the accommodation of sloops and other vessels, it proceeds: "And also at their own expense to cause such other public basins to be formed and completed as they may deem necessary, and to take to their own use the slippage or wharfage thereof, any law, usage, or custom, to the contrary notwithstanding." Then follows a provision that nothing in the act should deprive *persons who had made* piers under the act of 1801 (1798) of any legal right which they may thereby have acquired; and next a provision, that "it shall not interfere with any property, right, or privilege held under grants of the Common Council, or otherwise."

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This important section has not, I believe, received a judicial construction. Some views of it are submitted.

It clearly contemplates new basins formed by running piers from the exterior permanent streets. The line of such streets, sanctioned in 1798, and again in 1801, as established or to be established, necessarily would in time close all the basins within such line, except that at Coenties slip, and leave basins only beyond the outer line of the streets. This also was plainly the ulterior object.

Unlimited power is then given to the Corporation to make such basins by making piers, which were essential for the purpose, beyond the exterior streets, with two restrictions. First, that no right acquired by the owners of piers made under their direction should be violated; and next, that no right conferred in their grants should be impaired.

Perhaps the clause, as to piers made by individuals, may bear the construction, that it includes not merely piers built before April, 1806, but any pier built before the Corporation should order another, or others, to be made at their own expense which could interfere. In either case, the right plainly protected is the right to continue in receipt of wharfage—the right that the former slip should not be injuriously abridged. And as to the other reservation—if a grant of water lots, made either before or after the act, brought the grantee up to the inner line of South street, the right was most probably preserved to him of having the first privilege to make the piers. And perhaps the right of at least uniting in any extension of the pier is also appurtenant. This subject will be afterward noticed.

The practical operation of this construction of the act of 1806 is this: that in case of piers built by individuals, where the inner side formed one side of a slip, and there

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was no pier on the other side, the Corporation could construct a basin by making a new pier, and could do so all along the outer street, unless they came to another pier built by individuals, when their right would interpose.

The construction submitted involves these results: that the statute of 1798 (1801), giving a prior right to opposite owners to build piers, is virtually repealed, or, rather, may be superseded at the will of the Corporation, in every case except where it has not been previously acted upon by individual proprietors, or where the power of the Corporation has not been restricted by the provisions of their own grants.

The rights of those who had built piers prior to 1806 are expressly saved by the letter of the statute; the right of owners in front of the place, who held under grants prior to that time, are also indisputable. But, as to grants subsequently made, it may well be urged, that the grantees took, subject to this statute, and to the power of the Corporation to run out piers without any regard to them.

The power of the Legislature to change the act of 1798, and to confer the whole authority of building piers upon the Corporation, subject to these equitable restrictions, is indisputable.

In corroboration of the view now taken, it is to be noticed that the case of The Corporation *vs.* Scott was decided in 1804. That decision recognized the right of the owners of the fronting lots to build the piers. In the language of Mr. Justice Livingston, this was a right which the Legislature intended to grant to such owners, and an ordinance of the Corporation, not agreed to, could not restrict this right.

Then, on the 21st of January, 1805, the Common Council appointed a Committee to draw a memorial to the Legislature, "in order to invest them with a more complete title to the piers in the city."

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On the 15th of February, 1805, a petition and draft of a bill were reported, which were referred to the Attorney and Clerk of the Board; and on the 18th of February they reported a memorial and a law "for the better government of the city," which, no doubt, is the act of 1806.

The title is, among other things, "to grant additional powers and rights to the Mayor, Aldermen, and Commonalty of the city;" and the preamble runs thus: "Whereas, from the great increase and extension of the said city, its trade and inhabitants, it has become necessary to provide additional wharves, piers, slips, and basins in the said city, for the accommodation of vessels of different descriptions." It is fully settled, that piers may be run out directly against and from any part of a bulkhead made by individuals under grants, although they are entitled to the wharfage of that part of such bulkhead. The opportunity to make the piers must be first offered to them.

The principle is well argued in an opinion given by Mr. Emmet, Corporation Counsel to the Board of Assistants, in January, 1832. (Doc. Board of Assistants, No. 52, vol. 1, p. 201.) An abstract will be found in the note No. 51. And this point was expressly decided in Whitney *vs.* The Corporation, in the Court of Appeals.

The results of these various enactments and decisions appear to be these:

1st. Whenever a pier is to be run out from an exterior street, if the Corporation has granted the soil under water up to its line, by a grant made before 1798 (or perhaps before 1806), the privilege of making the pier must first be offered to the owner of the opposite lots.

2d. If he refuses, or if no such grant of soil under water has been made, or such grant is subsequent to 1798 (or 1806), then the Corporation may do the work them-

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selves, at the expense of the city, and take the whole emolument.

3d. And this involves the very important result, that the Corporation may make the piers under any compact and agreement which they think proper to enter into with the owners of the contiguous and opposite lots, or with any other persons whatever.

They have the power to require the owners to do the work, and the power to refuse them, the privilege of doing it, and doing it themselves. In the former case, the owners must have the whole wharfage; in the latter, the Corporation. It seems to me a most manifest conclusion, that the Corporation may then bargain with the owners of opposite lots to do the work, upon such terms, as to the proportions of cost and profits, as they can agree upon; that they may refuse to bargain with such owners at all; and may contract with any other persons whatever, upon any mutually covenanted terms.

Extension of piers.

The next subject of examination is the extension of piers.

The most useful discussion of this subject, I can present, will be a history of the case of Marshall *vs.* Vultee, which has been severely litigated, and has been decided since the first edition of this work. (See 1 Kernan, 461, and *post.*)

That case involves several points of great moment, has been the subject of much and long litigation, and the history of it will be found permanently useful in very many respects, besides the point actually in controversy.

The question in effect was, whether the Corporation had a right to take wharfage at the easterly side and at the end of a certain pier, known as pier No. 23, East River. The defendant was the lessee of the Corporation, and had distrained for wharfage on board of a vessel lying at the pier. The goods were replevied, and the question of right thus arose.

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The material facts were these. In 1750, the Corporation had granted to R. Cromeline a water lot, extending from Queen street wharf (now Water street) into the East River, or harbor, two hundred feet. There was a covenant, on the part of the grantee, to build a wharf or street on the outward part thereof, next to the East River.

In 1757, a further grant was made to R. Cromeline, of thirty feet into the river, of the same width as his first grant, viz., thirty feet.

This thirty feet was to be left for and made a wharf; and fifteen feet, out of his grant of two hundred feet, was to be added, so as to make the outward street, or wharf, forty-five feet wide.

On the 14th of January, 1804, the Corporation granted to the executors of R. Cromeline a certain water lot, between Front and South streets, of fifty feet in breadth; on the north-easterly side, one hundred and forty-seven feet and seven inches; and on the south-westerly side, one hundred and forty-eight feet in depth. The grantees were to build South street for the whole width of the lot thus granted, such street being seventy feet wide, and contiguous to the south-easterly side of the premises granted.

It appeared that South street was built by the grantees, or their assigns, but not until the year 1816.

The grantee of the Corporation, on the westerly side of the Cromeline grant, was H. Livingston; and, in the year 1762, an agreement, under seal, was entered into between Livingston and Cromeline, by which Crane Wharf street was laid out and dedicated to the public. It was twenty-four feet wide, twelve feet being contributed by each party. It ran, for the depth of the lots, from Water street, and, after the grant of 1804, was extended to South street. It appears that it extended into South street about forty feet, as it was ultimately built; and, when South street was opened, this portion of Crane street was absorbed in it.

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In 1816, application was made to the Supreme Court for the appointment of Commissioners, under the statute of 1813, to open Beekman street, from Pearl to South street. The report of the Commissioners was confirmed in December, 1818.

Under these proceedings, the Commissioners of Estimate and Assessment took thirty-eight feet in width (the residue of the Cromeline grant after taking out the half contributed for Crane Wharf street), and for the whole depth which the piers of Cromeline retained, being ninety-one feet nine inches, to Front street, and also thirty-eight feet by about one hundred and fifty-five feet from the south side of Front to the northerly side of South street. They awarded the owners thirty thousand dollars, which was paid. The report of the Commissioners and the rule of the Court is silent as to Crane Wharf street. That, as stated in the evidence, fell into and was absorbed by Beekman street also. I do not know that any proceedings were taken to effect this. There being a dedication was probably all that was necessary.

In the year 1821, a resolution of the Corporation was passed for building a pier (known as No. 23), from the south side of South street, two hundred and fifty-five feet nine inches, into the East River. This pier was thirty feet wide, and was entirely opposite to the land granted to Cromeline's executors, and taken upon the opening of Beekman street; that is, opposite to thirty feet of the easterly part of the thirty-eight feet so taken. It was, of course, directly opposite the easterly part of Beekman street. This fact is of great importance, as I view the case, and is fully made out by Ewen's testimony. (Fol. 157.)

The resolution of the 9th of July, 1821, was, that a pier be built at the foot of Crane Wharf street, provided the proprietors of water lots, between Crane Wharf street and

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Peck slip, bear and pay two thirds of the expense thereof. But, instead of building the pier at the foot of this street, it was built, as before stated, so as to have its westerly side about eight feet easterly from the line of Crane Wharf street.

It is of importance to notice one other fact. Under a statute of March 29th, 1816, and another of March 14th, 1817, the Corporation became possessed in fee of the ground lying between Fulton street (before Beekman slip) and Crane Wharf street, bounded on the north-west by Front street, and of all the wharves, piers and right of wharfage fronting such premises. This statute grant reached to Crane Wharf street on its westerly side.

From Beekman street eastward to Peck slip, the water lots up to and bounded on South street were held under grants from the Corporation, made from Water to Front street, in the year 1750, and from front to South, in the years 1809 and 1817.

On the 14th day of May, 1840, a resolution was adopted for extending piers Nos. 16 to 23, inclusive, a certain number of feet; No. 23 to be extended seventy-two feet; and on the 16th of September, 1841, it was resolved that the Street Commissioner cause pier No. 23, at the foot of Beekman street, East River, to be extended in accordance with the resolution of May, 1840, at the expense of the city, and for the benefit of the said Corporation, if, upon the expiration of the notice mentioned in the 232d section of the act entitled "An act to reduce," &c., the private owners of the easterly half of said pier shall have neglected to signify their willingness to contribute their proportion of the expense, according to law.

The notice given by the Street Commissioner was accordingly directed to the proprietors of the easterly half of pier No. 23, East River, stating that the Corporation had

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determined to extend the pier seventy-two feet into the river, and requiring such proprietors to signify, within six weeks, their intention to join with the Corporation in building such extension of the pier, and to contribute their respective proportion of the expense, as designated by law; or not to join with the Corporation, and not to contribute their respective proportions of such expense; and that if any owners or persons interested in the pier aforesaid should refuse or neglect to comply with the directions aforesaid, and should not bear their proportional part of the expense of building the said addition to the pier, they would forfeit all right and interest in the wharfage arising therefrom, agreeably to the act of the Legislature in the premises.

The private owners refused or neglected to join in making the extension of the pier. The Corporation made it at their own expense, and now claimed to be the owners of such addition.

It was in evidence that the pier, as originally erected in 1821, was built at the joint expense of the Corporation and the proprietors of the ground lying between Crane Wharf street and Peck slip. It is also stated in the evidence, that among such proprietors was the Cromeline estate, the grantees of the lot taken for Beekman street. The Corporation bore one third, and such owners two thirds of the expense.

The case was first decided upon a bill of exceptions at the General Term of the Court of Common Pleas, and the right of the Corporation sustained; Judge Ulshoeffer delivering the opinion. It was carried to the Supreme Court, where the decision was reversed. (4 Denio.) It was then carried to the Court of Appeals, where the judgment was reversed, and the case sent back for a new trial. The ground of reversal, however, did not touch the merits of

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the question. Upon a new trial and verdict, the Court of Common Pleas decided against the right of the Corporation. Judge Ingraham delivered the opinion; and from that judgment an appeal has been taken to the Court of Appeals.

There was also, in 1846, the case of Schermerhorn *vs.* The Corporation, before the Assistant Vice-Chancellor, involving the same question; and he determined also against the claim of the Corporation.

With the greatest deference to the judicial opinions expressed, it seems to me that the claim of the Common Council is tenable; and I submit the following propositions upon it:

1st. The act of 1798, renewed in 1801 and in 1813, conferred the power of running out piers from the exterior streets, at the expense of the proprietors of lots opposite the proposed piers; or, more accurately speaking, authorized the Corporation to give such owners the privilege of erecting the piers, and taking the profits.

2d. The Corporation was the owner of the lot at the foot of Beekman street, opposite to which the pier in question was erected in 1821, by virtue of the proceedings to open Beekman street. They held it, indeed, in trust as a public street, but the title and right of the Cromeline estate were entirely extinguished.

3d. There was not, in 1821, a person who had the slightest right to erect the pier, to acquire an interest in it, or to be subjected to the duty of making it, under any statute of the State, or otherwise. The Corporation possessed the entire and exclusive power of doing the work themselves, at the expense and for the use of the city.

4th. The rights which were acquired by others, in connection with the pier of 1821, were exclusively derived from the contract made with them by the Common Coun-

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cil. That contract was expressly a gratuitous offer of an interest. The whole extent of it was, that, upon paying a certain portion of the expense, those particular parties should have a right to the wharfage on the east side of the pier, and to one half the wharfage of the outer end. The privilege in question was not attached at all to the ownership of the bulkhead which made South street, but to the ownership of the water lots on the inner side of South street. This contract has not been broken at all, as to the eastern side of the pier. The owners receive the wharfage accruing there, as they did before. If the extension reduced that wharfage, this might possibly be the subject of damages in an action.

So, as to half of the wharfage on the outer end, if any right exists, it is a right to half the wharfage in the new state of the pier; or to that and any difference between what accrues there and what accrued before the extension.

5th. The right of the Corporation to extend a pier at this point is as great as the original right to make it. There is no restriction upon this right, except in the contract referred to.

If the view heretofore taken of the act of 1798 is erroneous, and under that act a power to extend a pier as well as to make one originally exists, then that power vested in the Corporation exclusively, by virtue of its ownership of the ground opposite, subservient only to the rights given to others in the contract of 1821, as before explained.

The power of extending piers is also conferred by the first section of the act of April 2, 1806, authorizing the Corporation to make additional basins at their own expense, not interfering with rights acquired in piers under the act of 1798. (§ 224 of 1813.)

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But clearly it is conferred by the second section of the last-mentioned act (230 of 1813), bestowing the power of enlarging any of the public slips. In the language of Judge Ingraham, "by the term *enlargement* of a slip, is undoubtedly intended as well the extension into the river as the widening." And Vice-Chancellor McCoun said: "There was an equitable obligation to regard the interests of the owners of the wharfage in the piers, and that was fulfilled by proffering to them the right to unite in the extension."

6th. There is not a statute, a section, or a clause in a statute, which does not establish, admit, or is consistent with, this important proposition, viz.: that the grant to make a pier beyond the four hundred feet—the right of construction—the consequent right of possession for construction and repair, are all plainly vested in the Corporation of New York. And further, there is not a clause which, by any interpretation, gives such a right to another. The right of every one else must depend upon the power of the Corporation; must be acquired through it. All other persons become beneficiaries; the legal title, or power and possession, being in the Corporation.

In the cases where proprietors or others acquire by statute any right, it is a right to wharfage, but not a right to take or collect it. That right, and the consequent right to enter and collect the wharfage, is held by delegation from the Corporation. It would seem to be clear that, if the Corporation cannot recover wharfage in this case, no one else can. The illegality is destructive of the right of every one, if it is so of the City.

7th. The section (§ 5 of the act of 1806, § 232 of 1813) is inapplicable to the case of an extension of an old pier. It is peculiarly applicable and naturally is limited to the case of a pier first run from one of the exterior streets.

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This is shown by its context with the other sections in the act of April, 1806, where it is first to be found. The first section of that act related to the formation of a basin, between Whitehall and Exchange slip; and the formation of other public basins at the expense of the Corporation. The second regards the enlargement of the slips as quoted in the Note. The third section speaks expressly of persons, who, under the act of April, 1801, shall have been *directed to sink or complete piers or bridges*, omitting to do so. The fourth section is applicable to the same class of persons, and to cases under the same act, and to none other; authorizing the Common Council to unite with those who agree to contribute to the work, in the place of those *proprietors* of fronting lots who refuse. Then comes the provision in question, that in *all cases* notice is to be given, as prescribed.

But to whom is this notice to be given? "To *the proprietors of lots.*" And of what? "Of the direction of the Mayor, Aldermen, and Commonalty for sinking and completing such piers and bridges." Turn to the fifth section of the act of 1798, and the seventh of that of 1801, and we find precisely this phraseology used in speaking of the piers and bridges to be run out from the exterior streets.

But who are the parties interested in the extension of a pier once built? Whose rights are to be affected? Certainly not those of the proprietors of the lots at whose expense the pier was first built, unless they remain owners of the pier. The rights of ownership may be, and often are, entirely distinct. This point Justice Jewett, in his opinion (4 Denio), fully admits. It is manifest that, if any parties should have an opportunity to oppose or unite in an extension, the owners of the interest in the pier are such parties especially.

The mode of proceeding under the first or second sec-

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tions of the act of 1806 (§ 228 and 230 of 1813) may be found in the second section of the act of April 2, 1803 (§ 269, act of 1813). These sections should be read together. They appear to me to present this case.

1st. The act of 1798 (§ 224 of 1813) of itself did not empower the Corporation to extend piers, once run out from the exterior streets; or at least it was supposed not to contain such an authority.

2d. The first section of the act of 1806 (§ 228, of 1813) conferred this power, by authorizing other public basins to be formed and completed as should be necessary for trade. In saving the rights of all who had built piers under the prior statute, from the exterior streets, it proves that such new basins could be made by extending old piers.

3d. But if this admits of doubt, yet the second section of that act (230 of 1813), authorizing the enlargement of any of the slips of the city, unquestionably bestowed it.

Whatever right of action, then, Marshall might have, on the ground of a diminution of his wharfage, it does seem to be the true result, that the power to collect the wharfage from strangers is clearly in the Corporation.

This case, since the publication of the first edition of this work, has been decided in the Court of Appeals. (See Marshall *vs.* Guion, 1 Kernan, 461.) The head note shows the points decided, as follows:

"Section 224 of the act of 1813 (2 R. L., 433), reducing the laws relating to the city of New York to one act, is not applicable to the construction of a pier, where the Corporation owns the lot opposite the place where it is to be built.

In such a case, the Corporation has the right to construct the pier at the expense of the City, and take the emoluments arising from it for its own benefit.

The Corporation granted to an individual a water lot on

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the East River, and he covenanted to construct in front of it, on the river, a street which should be and remain a public street of the city, and did so; and the Corporation covenanted that the grantee should enjoy the wharfage arising from the bulkhead created by the street; which he for a time received. Subsequently the Corporation acquired title to the granted premises, pursuant to sections 177 and 178, for the purposes of a street, and afterwards directed the construction of a pier opposite the premises. Such pier thenceforth formed the side of a public slip, and was built at the joint expense of the Corporation and the owners of lots adjacent to such granted premises, and the emoluments were shared between the Corporation and them, in certain proportions. The Corporation afterwards directed this pier to be extended into the river, and invited the proprietors to unite in constructing the extension, the expense and emoluments to be borne and shared in the same proportions as were those of the original pier, which offer they refused. The Corporation then extended the pier at the sole expense of the City.

It was held that the Corporation had authority to do this, and that the wharfage arising from the new portion of the pier belonged to them."

In the case of Thompson *vs.* The Mayor, &c. (1 Kernan, 115, from the Superior Court, 3 Sandford, 487), the second section of the act of 1806 was under consideration. That provides that, "whenever the Mayor, &c., shall think it for the public good to enlarge any of the slips of the city, they shall be at liberty and have full power to do so, and, upon paying one third of the expense of building the necessary pier and bridges, shall be entitled not only to the slippage of that side of the said piers which shall be adjacent to such slips respectively, but also to one half of the wharfage to arise from the outermost end of the said piers."

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It was held that the Corporation had the power to build piers and extend them into the river, for the purpose of unloading ships. The Corporation was entitled to the half wharfage of the outer end of piers so enlarged.

It was held that the word *slip* in this act designates the intermediate space formed by the docks. Slips might be enlarged by extending the piers into the river. It was not requisite that each side should be extended equally, or at the same time.

It has been decided, that a grant by the Corporation, of a strip of upland and down to low water mark, with a covenant on the part of the grantee (which he complied with), to build a wharf and street along low water mark, and a covenant by the Corporation that he should have all the wharfage and slippage in front of such premises, could not operate to prevent the Corporation from filling up intervening land for the purpose of constructing a street beyond such bulkhead, when public necessity or convenience requires it. But the exercise of this power did not operate to extinguish the covenant and rights under the grant, so as to prevent a claim for compensation. Such claim rested in damages.

The right acquired by the grantee was, in respect to the exterior line, nothing more than the right to receive wharfage from those who should use or make fast to the premises; but this right was clearly part of the thing granted. The right to receive the wharfage, and emoluments to arise from the wharf, lay in grant, and not in covenant merely. It was part of the thing granted. It was a necessary incident to the fee.

The Corporation having interposed, by filling in the space in front, a permanent obstruction to the reception of wharfage, the owner of the wharf had a claim to redress —a claim for damages for the injury to his land. (Van

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Zandt *vs.* The Mayor, Aldermen, &c., Superior Court, General Term, April, 1861.)

When Marshall *vs.* Vultee and Guion was before the Court of Appeals, Denio, Justice, observed: "As the proprietors were, before the extension, entitled to half the wharfage at the outer end of the original pier, and as that right was subverted by the extension, it may be that the right thus taken away, or destroyed, should have been appraised—that the case does not require us to decide that question."

In case of Murray *vs.* Sharp (1 Bosworth's Rep., 539), the action was, to establish the ownership and possession of a pier at the foot of Wall street, and to restrain the defendants, Sharp and others, from making erections for the purposes of a ferry, recently granted by the Corporation to them. Such erections would interfere with the access of vessels to the pier, and deprive the plaintiffs of wharfage.

The Corporation leased the slip between piers Nos. 16 and 15, or so much of said slip as belonged to them, for ten years; with liberty to establish a ferry from that point to Brooklyn. The northerly side of pier No. 15 was granted absolutely.

In May, 1797, the Corporation had granted to John Murray, Jr., proprietor of the upland, a water lot in front of his land, on the north-easterly corner of Wall and South streets. The grantee was to construct South street, of seventy feet wide, and a wharf on Wall street, of twenty-five feet in width, fronting the basin or slip which then ran up into the town. The Corporation covenanted that, on his building such streets and wharfs, he should be forever entitled to the wharfage from the wharf fronting the East River, which would be a front of ninety-eight feet.

Pier No. 16 was originally constructed by John Mur-

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ray, Jr., at his own expense. The pier was extended into the river at successive periods, and the Court concluded, as matter of fact, that the extensions were all at Murray's expense. The Corporation had never borne, nor offered to bear, any portion of such expense. This gave a right, and an exclusive right, to the wharfage. The Corporation could not, at the end of a number of years, offer to pay one third of the original expense, and thus obtain a right to a share of the wharfage.

The establishment of a ferry, which interfered with the plaintiff's rights to wharfage, by appropriating the slip, was illegal. If such a power could be exercised by the Corporation, it could only be on making compensation. A perpetual injunction was sustained.

In Taylor *vs.* The Mayor, &c. (4 E. D. Smith, 559), the suit was for damages for loss of a horse, occasioned by a pier being out of repair. The pier belonged to the city, but there was a lease of it, the contents of which were not shown in the case. It did not appear whether it was a lease of the pier itself, or only of the right to take the wharfage. The Court laid down the following position: If there was a grant of wharfage merely, or of a right to collect wharfage, the grantee paying an annual sum, the defendants, as owners of the pier, would not be exempted from the duty to repair. It was immaterial, for this question, whether the public piers were highways, or the Corporation an owner, with the right to pass and repass in the public.

On the other hand, if there was a grant of the pier itself, so as to vest him with the exclusive possession for his own benefit, the tenant, and not the landlord, was bound to repair, and liable to those injured by his neglect.

The learned Judge observed, that "he was not prepared to say that the public piers were highways, in such a

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sense that the Corporation may not lease them in such a wise as to give exclusive possession to the tenant. The wharves, in some sense, are public. Vessels, under certain regulations, and subject to the payment of wharfage, may come and make fast thereto, when not occupied by another vessel, and may discharge thereon. This is a common right in all who navigate our waters, and all the wharves are subject to the ordinances of the city, regulating the same. In other respects, the usual incidents of ownership attach to them.

It may be that legislative authority would be necessary, to authorize the Corporation to devote any of the piers to a use wholly inconsistent with, or infringing, the common and public right of those who navigate our waters, to come to the wharves, and discharge there. Still, the exclusive use of a pier might be granted to one, whose possession would be exclusive of the Corporation and of all others, except the public referred to."

In The Mayor, &c., *vs.* Rice (4 E. D. Smith, 604), it was decided, that the Common Council was authorized to grant the exclusive use of piers, wharves, and slips for particular classes or descriptions of vessels.

It was considered a doubtful question, whether they could grant to individuals the exclusive use of piers, &c., for the grantee's individual benefit. At any rate, such power could not be exercised by deed or lease, executed under its authority by its officers. It could only be, if at all, under its legislative power, by laws or ordinances passed in its legislative capacity.

But, assuming the grant of such exclusive use valid, it could not supersede the operation of the general ordinances of the city, regulating the use of the wharves, &c.

A lease of the east part of pier No. 7, and west half of pier No. 8, with the bulkhead between, together with the

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end of pier No. 7, and one half of the end of pier No. 8, was held to include the entire waters between piers Nos. 7 and 8.

An act was passed on the 13th of April, 1857, entitled "An act to regulate the use of slips and wharves of the city of New York, between piers No. 2 and No. 12, East River" (Sess. Laws, 1857, ch. 367).

The act of the 17th of April, 1857, to establish bulkheads and pier lines (Session Laws, ch. 763), is fully stated, *post*, title, "Line of Exterior Streets."

SECTION X.

OF THE RIGHT TO FERRIES.

The earliest record I have been able to find, connected with the ferries from the city of New York, is the following.

On the 1st of July, 1654, an order was made by the Director-General and Council, as follows: "Daily confusion occurring among the ferrymen on Manhattan Island, so that the inhabitants are waiting whole days before they can obtain a passage, and then not without danger and at an exorbitant price, it is ordered by the Director-General and Council— Order of 1654.

1. "That no person shall ferry from one side of the river to the other without a license from the Magistrates, under the penalty of £1 Flemish, for the first offense, £2 for the second, and £3, with condemnation of the boat and corporal punishment, for the third infraction of this order; one third to the Ferryman, one third to the Fiscal, and one third to the disposition of the Judge.

2. "The ferryman is to be allowed as follows." Then follow the rates.

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3. "The ferryman cannot be compelled to ferry anything over before he be paid."

The hours were prescribed, and certain persons were exempted from tolls.*

Petition of 1658.

On the 17th of September, 1658, a petition of the Burgomasters and Schepens of the city was presented to the Director and Council, praying among other things, "that the rent of the ferry, 'about which we have heretofore frequently troubled your Honors, may be conferred at once."

I have not been able to ascertain when this application was granted.

Record of 1660.

At a court of the Burgomasters and Schepens, held on the 16th of April, 1660, is an entry as follows: "Mr. Paulus complains that Anneken Van Borsum took too much ferriage from him in difference of a|cs, exhibiting the a|c."

Which being communicated to Anneken, says, "that her son, Harmanus, who is without, has better knowledge thereof; and being called in says, that the Herr Fiscal told him he may take six stivers ferriage when the ice is going."†

Petition of 1683, for Ferry rights, &c.

On the 27th of October, 1688, a petition was presented by the Mayor and Aldermen to Governor Dongan and Council, setting forth "that the public works were much out of repair and decayed, a former application for a confirmation of the rights and advantages of the city; and praying that the Governor would be further pleased to confirm to the city all vacant lands within the island to low water mark, the benefit of granting licenses to all to keep public houses, the benefit of dock, wharf and bridge, market and market house, *with the ferry now between the city and Long Island, or which hereafter shall be appointed between*

* Albany Records, vol. vii., p. 507, extracted by Mr. Valentine, Manual for 1848.

† Records in the office of the Common Council.

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the said city or any other place, which may help to enable them to defray their public charges."

On the 6th of December, 1683, the Governor and Council, after expressing their wonder at receiving another petition when they had lately made so large a grant, ordered,

"That the Ferry be granted with a proviso, that two boats for passengers be kept on each side of the river, and one boat for cattle on each side of the river." Also, "No ferry in any other place allowed, but what is already."* Order of 1683.

The charter of Dongan (1686) recited, that "the citizens and inhabitants of the city had, at their own cost and charges, established and settled one ferry from the said city of New York to Long Island, for the accommodation and convenience of passengers, the said citizens and travelers."† Clause in charter of 1686.

By the granting clause in the second section of this charter, the Governor "granted, gave, ratified and confirmed unto the Mayor, Aldermen, and Commonalty, their successors and assigns (among other things), the aforementioned ferry, with the rights, members, and appurtenances; and the rents, issues and profits of the said ferry; together with full power to establish, appoint, order and direct the establishing, making and laying out all ferries and bridges in and throughout the said city of New York and Manhattan's Island aforesaid, and for all passengers there."

We find in the ancient records some traces of the action of the Common Council under this charter. Acts of Common Council.

On the 6th of November, 1691, the ferry was farmed out at public outcry, to John Arrenston, for seven years,

* Records in the office of the Common Council.

† In the charter of Lord Cornbury, granted in 1708, the petition of the Common Council stated that this ferry had been established and used by them for fifty years and upwards. This would bring the date to about 1658.

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from the 1st of February ensuing, at the rate of £14 per annum.

On the 8th of August, 1692, John Arrenston "complained that D. Lawser, Carl Saybrook and others, made a daily practice of bringing over passengers and corn from Long Island, to his damage."

Whereupon it was ordered "that no person beside the ferryman shall bring any passengers, or corn, or other produce of the island from any place between the Red Hook and the Wallabout, under the penalty of 21*s.* for every offense; one half to the ferryman, the other half to the informant."*

At a meeting of the Common Council, held on the 13th of April, 1694, a resolution was adopted, that the sum of £200 be raised for necessary repairs for the defense and security of the city, and that a Committee be appointed to raise it on the easiest terms, with authority, for the security and payment thereof, to mortgage the ferry of the city for the space of three years.

On the 18th of April, 1694, the mortgage was presented by the Recorder, and ordered to be engrossed and sealed.

On the 2d of February, 1698, an ordinance was passed, regulating the whole subject of the ferry to Brooklyn; settling the conditions of the lease to be given; establishing the rates of ferriage, and prescribing the duties of the farmer of the ferry and ferryman, the hours of running, &c.

"The rates were to be paid by all the passengers at their going into the ferry boats, and for all cattle, &c., when the ferryman received the same into his book, in silver or wampum."

Petition of 1702.

In 1702 (March 16), the Common Council presented a

* From a book being a transcript of acts of the Common Council, in 1691–2, in the possession of Fred. De Peyster, Esq. Abraham De Peyster was Mayor at the time.

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petition to Lord Cornbury, a copy of which will be found in the Note.*

At the meeting of the Common Council, held on the 2d of February, 1708, the Mayor stated, "that the Governor had acquainted him, that one Cornelius Sebring had petitioned his Lordship for the Queen's grant for a ferry between the city and Long Island, and that he had ordered him a copy of such petition, which the Mayor produced and was read." It is transcribed in the Note.† C. Sebring's petition, 1708.

It was ordered "that this Corporation do forthwith petition his Excellency to reject such petition, and that a petition be drawn by the Town Clerk, accordingly."

On the 4th of February, 1708, the petition was presented to the Common Council, and adopted. It stated that the inhabitants of the said city and corporation had for seventy years past quietly possessed and enjoyed divers rights, privileges and franchises, under various grants, &c., and among the rest, that of the ferry between the said city and Nassau Island, and that the loading and landing places of the said ferry had been commonly esteemed and reputed from certain dock stones on a certain point to a hill to the westward thereof, &c. Petition in reply.

They then recite the great convenience of the ferry to the inhabitants, it being the chief source of income to keep up the public buildings—the grant of it in 1686 by the charter—and the confirmation by the act of the Assembly of 1691.‡ That Cornelius Sebring was soliciting a grant for another ferry, designing to ruin the present one, which framed the chief income and support of the Corporation, and it then was prayed, that such unreasonable and unjust application might be rejected.

* Note No. 25. It asked for the land under water, as well as for ferry privileges.

† Note No. 52.

‡ The general act confirming grants and charters.

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Petition for grant on Nassau Island.

On the 3d of March, 1708, the Mayor reported to the Common Council, that the petition of Sebring had been rejected. And it was then resolved that this Corporation forthwith petition his Excellency for a grant of the vacant land upon Nassau Island, from high water to low water mark, from the Wallabout to Red Hook, for the further convenience of the ferry of this city, with power to establish one or more ferries, if there should be occasion, and confirmation of the same under a moderate quit-rent, and to appoint reasonable rates of ferriage, &c.

The petition was presented accordingly, and the charter issued by Lord Cornbury, in the reign of Queen Anne, 1708, was limited to this special purpose. The petition will be found in the Note.*

Acts of the Council on petition.

The action of the Governor and Council upon this subject, was as follows, (See vol. x. of Council Minutes, Albany Records.)

January 3, 1708, the petition of Sebring was received and referred. A copy was directed to be sent to the Common Council. On the 5th of February, a caveat was received from the Corporation. Counsel were heard on the 26th of February, 1708, and Sebring's petition was rejected. On the 25th of March, the petition of the Mayor, &c., for a charter was presented. On the 8th of April, letters patent were ordered to be prepared; and, on the 15th of April, a warrant to the Attorney General to prepare the letters patent was signed.

Lord Cornbury's charter.

The charter, after reciting such petition, proceeds as follows:

"The which petition we being minded to grant, *Know ye*, That of our special grace, &c., we have given, granted, ratified, and confirmed, and in and by these presents, for us, our heirs and successors, we do give, grant, ratify and con-

* Note No. 53.

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firm, unto the said Mayor, Aldermen, and Commonalty of the city of New York, their successors and assigns, all that said ferry called the old ferry, on both sides of the said East River, for the transportation of passengers, goods, horses and cattle over the said river, to and from the said city and island; and as the same is now used, held and enjoyed by the said the Mayor, Aldermen, and Commonalty of the city of New York, or their under tenant or under tenants, with all and singular the usual and accustomed ferriage, fees, perquisites, rents, issues and profits, and other benefits and advantages whatsoever to the said old ferry belonging or therewith used. And also, all that aforesaid vacant and unappropriated ground, lying and being on the said Nassau Island (alias Long Island), from high water mark to low water mark aforesaid, contiguous and fronting the said city of New York, from the aforesaid place called the Wall-About to Red Hook, aforesaid. That is to say, from the east side of the Wall-About opposite the new dwelling house of John Bodine, to the west side of the Red Hook, commonly called the fishing place, with all and singular the appurtenances and hereditaments to the same belonging, together with all the rents, issues, profits, &c., *except, and always reserved* out of this our present grant and confirmation, free liberty and license to and for all and every person or persons inhabiting, or having plantations near the said river, by the water side, within the limits and bounds above mentioned, to transport themselves, goods, horses and cattle over the said river, to and from the said city of New York and Nassau Island (alias Long Island), to and from their respective dwellings, or plantations, without any ferriage, or other account to the said ferry hereby granted and confirmed to be paid, or given; so also as the said person or persons do transport themselves only and their own goods, and in their own

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boats only, and not any stranger, or their goods, horses or cattle, or in any other boat."

The Habendum is: "*To have and to hold* all and singular the said ferry, vacant land and premises, hereinbefore granted and confirmed, or meant and intended to be granted and confirmed (except as hereinbefore excepted); and all and singular the rents, issues and profits thereof, unto the said Mayor, &c., their successors and assigns forever, to the only proper use and behoof of the said Mayor, Aldermen, and Commonalty forever, yielding the yearly rent of 5*s.*, payable as therein expressed."

The charter proceeds: "And we do further, for us, our heirs and successors, give and grant unto the said Mayor, Aldermen, and Commonalty, and their successors, full and free license and leave, to set up, establish, and keep, and maintain one or more ferry or ferries, as they shall from time to time think fit and convenient, within the limits and bounds aforesaid, for the ease and accommodation of transporting of passengers, goods, &c., between the said city of New York, and the said island (except as hereinbefore excepted), under such reasonable rates and payments as have been usually paid and received for the same, or which at any time hereafter shall be by them established, and by and with the consent and approbation of our Governor and Council of our said province for the time being."

Then follows an authority "to make and establish all manner of by-laws and ordinances for the more orderly keeping and regularly maintaining the ferry that is now kept, or any ferry or ferries which shall, at any time or times hereafter, be set up, established, or kept within the bounds aforesaid, by virtue hereof, or of, for, touching or concerning the same (so always as the same be not contrary to our laws of England and our Province of New

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York), and the same to abrogate or change as they shall see fit."

37th section of Montgomerie's charter.

The 37th section of the charter of Montgomerie "gives, grants, ratifies, and confirms unto the said Mayor, Aldermen, and Commonalty of the city of New York, the new City Hall, &c., and the ferry and ferries on both sides of the East River, and all the ferries now or hereafter to be established and erected all round the Island of Manhattans; and the management and rule of, and all fees, ferriages, and perquisites to the same, or any part thereof, belonging, or to belong."

Clause in the 15th section.

By the last clause of the 15th section, it was declared, that "the Mayor, Aldermen, &c., for the time being (but no other person or persons whomsoever, without the consent, grant, or license of the said Common Council), should, from time to time, have full, sole, and whole power of settling, appointing, establishing, and ordering such and so many ferries round Manhattans Island, alias New York Island, for the carrying of goods, &c., from the said island to Nassau Island, and from thence back; and also from the said Island Manhattans to any of the opposite shores all round the said island, in such and so many places as they shall see fit."

Statutes of 1717, &c.

It appears that, from the year 1686, if not before, the rates of ferriage were adjusted, and the whole subject controlled, down to the year 1717, by the Common Council. In that year, an act regulating the rates, and for other purposes, was passed by the Assembly, to last seven years. This was renewed in 1724, and again renewed until the passage of the permanent act of 1732.

Statute of 1732.

The statute of 1732 appears to have formed the Colonial law upon the subject of ferries, and the law of the State, until the act of the Legislature of 1789. An abstract of its material provisions is given in the Note.*

* Note No. 54.

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The liberty which was given by the 5th section of the act was restricted to the owners on the water side. They might transport their own goods in their own boats.

Application to Assembly of 1746.

In 1746, the Trustees of Brooklyn applied to the Assembly for relief; which led to the introduction of a bill "to repeal the ferry act, so far as it related to the freeholders and inhabitants of the township of Brooklyn, in Kings county."

I apprehend that a repeal would have enabled any inhabitant of Brooklyn to have kept a boat and ferried over others, and the goods of others, for hire, landing at any place other than at the established ferry, as he could get permission from the owner. This would have been an effectual disseizin of an exclusive ferry right. Yet the repealing act passed the Assembly by a vote of nine to eight. It was lost in the Council, and never became a law.*

Act of 1789.

After the Revolution, the act of the Legislature, of the 28th of February, 1789, was adopted. This act repealed the 1st, 2d, and 7th sections of the act of 1732. The first section of the latter act related to the rates of ferriage; the second to the penalties for a violation of the act; and the seventh prescribed the mode of suing for and recovering the penalties. The first section of this act of 1789 established other and different rates of ferriage. It varied the penalty for refusing to pay the rates, and imposed a penalty on the ferrymen for exacting more; it directed the putting up a board at the ferry-house, with the rate legibly shown, and the hours of running the boats.

The 6th section was as follows: "It shall and may be lawful for any of the inhabitants of the township of Brooklyn to transport their own goods, in their own boats, from the Island of Nassau to the city of New York, and from

* See Journals Assembly, vol. ii., pp. 117, 118.

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the city of New York to the Island of Nassau, without paying any ferriage for the same."

In the 7th section, the mode of recovering the penalties was pointed out; and by the 8th section, the 1st, 2d, and 7th sections of the act of 1732, were repealed.

The act of 1801 embodied all the existing provisions, with some variations; and several new clauses were added. The most important of these was the clause corresponding with the 53d section of the present act, forbidding any person or persons, except the Mayor, Aldermen, and Commonalty of New York, from erecting or keeping a ferry between the city and Nassau Island. Acts of 1801, &c.

This act was amended, and substantially re-enacted, on the 2d of April, 1810; and the latter statute amended in relation to the size of barges, on the 15th of June, 1812.

And the whole of these provisions were embodied in the revised law of 1813 (2 R. S., 355). For an analysis of this statute, and a transcript of its material sections, see the Note.* Act of 1813.

In 1815 (April 11), a law gave permission to the Corporation to construct wooden buildings for ferry houses, on any of the streets or wharves contiguous to the present or future ferries, from the city to Nassau Island, Staten Island, and New Jersey. And in 1822 (April 17) the ferry masters or owners of the ferry boats on the public ferries, between the city of New York and the Island of Nassau, were subjected to a penalty of five dollars for a longer detention of passengers than was allowed by law, to be sued for within three days from the time of such detention. Act of 1815. Act of 1822.

There was an exemption from the penalty, in case the wind, weather, or ice should render the crossing of the river dangerous, or very difficult, at the time complained of, and in case of accidents and casualties.

* Note No. 55.

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By the 2d section of the same act, "the ferry masters, or owners of such ferry boats, are not to permit the boats to be used in any other business than from ferry stairs to ferry stairs, except to relieve vessels in distress; said vessels being at the time in the East River, east of Governor's Island, and west of Catharine street Ferry. The penalty is fixed at fifty dollars, to be recovered at the suit of the overseers of New York, or of Brooklyn, whichever should first sue."

Statutes upon introduction of steam.

Upon the introduction of the application of steam to ferry boats, some other statutes were passed, which appeared to be expedient or necessary.

The act of March 4th, 1814, was made upon a memorial of the Corporation, praying for an increase of the rate of ferriage, at Fulton Ferry, in consequenee of the intention of the lessees to put steamboats on the ferry; and also, that the Common Council might be authorized to pass ordinances for preventing ships and other vessels from interrupting such steamboats, in their passage across the ferry. The act specified certain increased rates of ferriage at that particular ferry.

By the 4th section, power was given to "the Mayor, Aldermen, &c., in Common Council convened, to make such ordinances and by-laws, as to them should seem proper, to restrain and prohibit the mooring or anchoring of any ships or other vessels, at such place or places as will crowd or interfere with the steam ferry boats in their passage, and to impose reasonable fines and penalties for a violation."

Report of Ferry Committee, 1831.

In June, 1831, a report of the Committee on Ferries was made to the Board of Assistants, in which it is stated that "in the lease granted in January, 1814, of the Fulton ferry, it was covenanted that the Corporation would apply to the Legislature for a law, authorizing four cents to be

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received from the passengers, instead of two, in steam ferry boats; and that, if such act was refused, the lessees should still be permitted (so far as the Corporation had power to permit them) to receive four cents in steamboats."

The Committee then observe, that the statute in terms applies, touching the increase, only to the case of the Fulton Ferry, but that its application to other ferries was in accordance with the spirit of the act; and, accordingly, with the sanction of the Corporation, this rate was charged at the other ferries using steamboats.

The Committee also reported that they had found no act of the Legislature, regulating the ferries between this city and New Jersey.

The lease of Jersey City Ferry, made in September, 1825, has a schedule of rates, or tolls, annexed to it, with a stipulation that the lessees shall not take any greater rates. The lease for the ferry at Hoboken is governed by the same schedule as to the rates. So that the amount of ferriages and other regulation of the whole matter is adjusted by the leases or contracts made between the Corporation and lessees.*

In the documents of the Board of Assistants, for 1832 (No. 26, p. 129), will be found copies of all the ferry leases then in existence.

The fact, noticed in the report of the Ferry Committee before stated, that the act of 1814 does, in terms, apply only to the Fulton Ferry, and yet the increased rate had been charged at the others using steamboats, suggests a question as to the concurrent power of the Corporation in connection with the act of 1813.

Powers under charters.

We find the powers of the Corporation, under the charter, perfectly sufficient to regulate and carry on the ferries,

* Report in Proceedings Board of Assistants, 1831.

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from 1686 to 1717, as to the ferry between the city and Brooklyn; and as to ferries over the North River, sufficient to this day. It is highly probable that the act of the Legislature of 1717 and the subsequent acts arose from the difficulties which had existed, and subsequently existed, between the inhabitants of Brooklyn and the city authorities. It may have been thought advisable to give the full sanction of the highest authority to the regulations upon this subject.

The portions and provisions of these acts, as to which any question could exist whether the Common Council was competent to ordain them, were those imposing a forfeiture of treble the fare in one case, and of certain sums by way of penalty, in other cases.

Yet the power to enforce their ordinances by fine and amercements, and to recover the same by distress, or any other legal mode, would have warranted the Corporation in imposing a fine, for the violation of an ordinance, not unreasonable, and would have attained the objects effected by the act.

Act of 1845.

On the 14th of May, 1845, the Legislature passed an act to establish and regulate ferries between the city of New York and Long Island. By this, the governor was to appoint three Commissioners, who should have power to grant licenses for establishing and keeping so many ferries, and at such places as in their opinion the public convenience might require, between the city of New York and Long Island; but not to grant a license for any ferry or ferries which shall interfere with the rights, franchises or privilege of the Mayor, Aldermen, and Commonalty of the city of New York, in or to any ferries already established, nor for a longer period at any one time than ten years.

Benson *vs.* The Mayor, &c.

Under this act, the case of Benson *vs.* The Mayor, &c., has been determined, of which the following is an ab-

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stract: "On the 17th of October, 1848, the Commissioners under the above act granted to the plaintiffs in the suit a license to establish and keep four ferries between New York and Brooklyn, viz.: the ferry commonly known as the 'Fulton Ferry,' 'Hamilton avenue Ferry,' and a new ferry from the foot of Wall street, in the city of New York, across the waters of the East River, to the foot of Montague street, in the city of Brooklyn."

The licenses for the three first-named ferries were to commence upon the expiration of certain leases of the same, which had been granted by the Corporation of New York.

In December, 1860, the Common Council passed a resolution, renewing the leases of these three named ferries, for ten years, from the first day of May ensuing; the old leases being about to expire, or being terminable at pleasure.

The complaint was filed by the parties claiming under the license of the Commissioners, to restrain the Corporation from issuing the leases pursuant to this resolution. Judge Barculo, in a very clear and well-reasoned opinion, came to these conclusions:*

1. That the old or Fulton Ferry, having been in existence at the time of the grants (in the charter), became thereby vested in the Corporation of the city as property; and is so held at this time by an indefeasible title.

2. That the Corporation, having acted upon the grants by establishing and maintaining the other two ferries, known as the "South Ferry," and "Hamilton avenue Ferry," have acquired therein vested rights, which cannot be resumed by gratuitous legislation.

3. That the act of May 14th, 1845, does not by its terms embrace, but excepts the three existing ferries, and leaves them undisturbed in the Corporation.

* Benson *vs.* The Mayor, &c., of New York, 10 Barbour, 223.

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4. That the question of the right to establish in future other ferries, and how far the act of 1845 may interfere therewith, was not now before the Court, and therefore was not passed upon.

The course of reasoning of the learned Judge is substantially this.

He states the grant in the charter of Dongan—that in Lord Cornbury's charter, and in Montgomerie's; especially the clause of the 37th section, granting the ferry and ferries on both sides of the East River, and all other ferries now and hereafter to be erected and established, all around the Island of Manhattan, and all fees, ferriages, and perquisites belonging to the same. He next adverts to the 15th section, and notices the clause excluding every other person except the Mayor, &c., from establishing a ferry around Manhattan Island.

The colonial act of 1732 is then referred to, and the substance of its clauses stated.

The subject is then considered under three heads:

1. The title of the Corporation to the old or Fulton ferry.

2. The title to the South and Hamilton avenue ferries.

3. The right to establish future ferries.

As to the first point, he holds that it was conveyed in fee by the same terms that conveyed the City Hall, markets, &c.; and as there could be no doubt that a ferry in *esse* might be the subject of an absolute grant in fee, which will vest in the grantee an indefeasible estate, it followed that the Corporation was seized of the Fulton ferry by a title which no gratuitous act of the Legislature could divest.

As to the second head, he points out the distinction between a power to create and keep ferries, and receive the profits as a source of emolument as well as for public convenience, and a mere authority bestowed, as a branch of

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the sovereign prerogative, to license, superintend, and govern ferries for the public good; a power which could be transferred or resumed by the government.

He considers the question as depending upon this distinction, and pursues his inquiry through various statutes of the State, particularly the one granting authority to the Court of Common Pleas, in each county, *to grant licenses for keeping ferries*, as well as through various decisions of Courts. He contrasts the bare powers thus conferred with the ample language used in the charter and statutes, conferring absolute ferry interests and rights of property, and concludes, "that the City had acquired vested rights and valuable interests in these ferries, which could not be taken away by the Legislature."

It is scarcely too much to say, that an opinion so well reasoned, and founded upon such solid principles, is in little danger of reversal. It may be therefore treated as a correct exposition of the law, so far as it extends.

Question as to right over all other ferries.

The learned Judge purposely left the question of the right of the Corporation to control all other ferries, not created at the time of the passage of the act, untouched. I shall endeavor to show that the power of the Corporation is in this case also absolute and exclusive; that is, to all ferries around the Island of New York.

1. What is the extent of the grant, and what the clauses in the charters or statutes conferring the franchise?

The charter of Dongan (§ 2) gave and confirmed unto the Mayor, &c., "the aforementioned ferry, together with full power to establish, appoint, order and direct the establishing, making and laying out all ferries and bridges in and throughout the said city of New York, and Manhattans Island aforesaid, and for all passengers there."

Lord Cornbury's charter, after granting the old ferry, and the strip of land under water, from the Wallabout to

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Red Hook, also gives and grants "full and free license to set up, establish, keep and maintain, one or more ferry or ferries, as the Mayor, &c., shall from time to time think fit, within the limits and bounds aforesaid, for the accommodation of transporting passengers, &c., between the city of New York and the said island, except as before mentioned." The exception refers to the privilege reserved to the inhabitants of Brooklyn, of bringing over their own produce, &c., in their own boats.

Then follows the authority to make and establish all by-laws and ordinances for the keeping and maintaining the ferry that is now kept, or any ferry or ferries which shall at any time or times hereafter be set up, established, or kept within the bounds aforesaid; and the same to abrogate or change as they see fit.

The 37th section of Montgomerie's charter gives, ratifies and confirms unto the said Mayor, Aldermen, &c., the ferry and ferries on both sides of the East River, and all the ferries now or hereafter to be created or established all round the Island of Manhattans, and the management and rule of, and all fees and perquisites belonging or to belong to the same, or any part thereof.

By the last clause of the 15th section of such charter, it was declared, that "the Mayor, Aldermen, &c., for the time being (but no other person or persons whomsoever, without the consent, grant, or license of the said Common Council), shall, from time to time, have full, sole, and whole power of settling, establishing, appointing, and ordering such and so many ferries round Manhattans Island, *alias* New York Island, for the carrying of goods, &c., from the said island to Nassau Island, and from thence back; and, also, from the said Island Manhattans to any of the opposite shores all round the said island, in such and so many places as they shall see fit."

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The statute of the 2d of November, 1717, which was the first colonial act upon the subject, was revived in 1726, again in 1727, and made perpetual on the 4th of October, 1732.

By the 6th section of this latter act, it was enacted, "that no other person or persons whomsoever, other than the said Mayor, Aldermen, and Commonalty of the city of New York, their successors and assigns, shall presume to keep a ferry between the city of New York and Nassau Island, for carrying or bringing of any passengers, cattle, goods, &c., over the said ferry hereby rated and established, for any hire, wages, or recompense whatever, under the penalty of £50, &c., for every offense."

The statute of the 28th of February, 1789, the first passed after the Revolution, repealed several sections of this act of 1732, but left this sixth section in force.

The sixth section of this statute of 1789 was as follows: "It shall and may be lawful for any of the inhabitants of the township of Brooklyn to transport their own goods in their own boats, from the Island of Nassau to the city of New York, and from the city of New York to the Island of Nassau, without paying any ferriage for the same."

The act of the 2d of April, 1801, embodied the then existing provisions of the law, with a few changes and additions; and the above-cited sections remained in full force.

A statute of 1810 re-enacted them; and finally they were adopted into the revised law of 1813. The 53d section relates to the right of the inhabitants of Brooklyn to ferry over in their own boats, with a strict provision, prohibiting such inhabitants, under a penalty, from transporting others, or the goods of others, under the color of this right. The 53d section is a re-enactment of the 8th section of the act of 1801, being in effect the 6th section of

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that of 1732. It is as follows: "No person other than the said Mayor, Aldermen, and Commonalty, shall erect or keep a ferry between the said city and Nassau Island, for carrying or bringing of any passengers, horses, cattle, hogs, sheep, goods, merchandise, or other things whatsoever, over the said ferry, hereby rated, with or without any hire or reward, under the penalty of $125 for each offense."

This statement of the clauses of charters and statutes presents two leading questions.

I. The right of the Corporation, independent of the prohibitions contained in the 52d and 53d sections of the present statute.

II. That right in connection with such prohibitions.

I apprehend that the following propositions are sustainable.

1. The right to establish ferries, and to grant the franchise of a ferry over a navigable stream, is vested in the sovereign power. This power was the Crown before the Revolution, and is the State since.

2. This right is absolute. It is not restricted by any pre-emptive right, to such a grant, in the owners of land on the banks of the stream.

3. The State exercises the right, either by empowering a particular body to grant a license to keep a ferry, or by an express grant of a ferry. The former implies no transfer of property to the grantees of the power. They are merely ministerial officers to exercise the power. The latter imports a right of property, more or less exclusive or restricted, according to the terms of the grant.

4. An express grant of a ferry right, with fixed limits, is necessarily exclusive within the limits defined in the grant.

5. But in ascertaining these limits, and in construing

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such grant, the rule applicable to grants by individuals is reversed, and the implication is against the grantee. The language is to be strictly construed, so that nothing shall pass unless clearly intended, and by language plainly competent to pass it (8 Howard, 581).

6. But with this qualification, the grant of the right to, or to establish, all ferries from one fixed point on a river to another point, with words of perpetuity, without restriction, and without a reservation of a power over it, is as absolute a grant of property as a patent for a tract of land.

7. It is therefore to be dealt with as private property, subject only to the right of the sovereign power to take it away, or impair it, for public purposes, and upon full compensation. I have stated in a note all the authorities upon this subject which I have met with.*

Let the grants to the Corporation of New York be tested by these principles, and it will appear to be a necessary conclusion, that the entire right and exclusive right is vested in them for all ferries around the whole island.

The charter of 1708 gives "the Mayor, Aldermen, and Commonalty, &c., full and free license to set up, establish, and maintain one or more ferry or ferries, as they shall from time to time think fit, within *the said limits and bounds aforesaid.*"

These bounds were from the east side of the Wallabout to the west side of Red Hook, on the Long Island side, and from any part of the city of New York, on the other side.

Then power is given to make all by-laws for maintaining the ferry that now is, or any ferry or ferries that shall at any time be set up within the bounds aforesaid.

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* See Appendix, Note 56.

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The charter of Montgomerie "gives, grants, and confirms the ferry and ferries, now or hereafter to be established or erected all around the Island of Manhattan, and all fees and perquisites to the same belonging."

The act of 1732 gave the power of keeping and establishing one or more ferry or ferries between the said city of New York and the island of Nassau. The statute of 1789 left this clause in full force. That of 1801 re-enacts it in nearly the same language, and the act of 1813, in the 47th section, repeats and renews it.

It would be difficult to find language more clearly adapted to convey an absolute and exclusive right. The proposition is, that if a grant is made of a ferry within limits defined, from one certain point to another certain point, it is inherently exclusive within those points. The Corporation of New York has the right to establish and keep ferries all around the island of Manhattan, and on the Long Island side, from the Wallabout to the Hook.

Has the State the right to establish ferries within certain limits? It is incontestible. Has the State the power to vest the exclusive right to keep ferries within definite limits, in others? It cannot be denied. If so, what language could be employed to vest such right more explicit and more comprehensive, than what has been employed to grant it to the Corporation of New York? If the sovereign power of government can confer such a title, and if language is competent to transfer it, the Corporation possess it.

The most strict examination of the authorities in the Note* will, I think, show that there is nothing to disprove the proposition, that a grant of all ferries from one point on a river to another point on the same, with power to establish as many ferries within such limits as the grantee

* See Appendix, Note 56.

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thinks proper, is in itself exclusive, and another ferry cannot be licensed within such bounds. I do not advert to the power of authorizing a railroad or other bridge over the waters where a ferry has been granted. The cases are very distinguishable.

II. *But secondly*, the 52d and 53d sections of the present statute are to be considered. The one contains an exception to the exclusive right of the Corporation, in favor of the inhabitants of Brooklyn to transfer themselves and their own goods, in their own boats. This reservation in favor of a particular class, for special purposes, points out clearly the exclusive absolute character of the right as to every other class of persons, and in all other circumstances.

But next, the prohibition in the 53d section, taken from the 6th of the act of 1732, is of the highest importance.

There is a positive prohibition of any person or persons, except the Corporation, from erecting or keeping any ferry between Nassau Island and New York, under a penalty. Now, by Montgomerie's charter, the Mayor, Aldermen, &c. (but no other whatsoever without their consent), were granted "*full, sole, and whole power* of establishing ferries around Manhattan Island, for carrying goods, &c., from said island to Nassau Island."

The section of the act in question was to carry out and make more available this grant of power and property. It inflicted a penalty upon all who should interfere with, or violate it.

The phraseology of the 52d section may call for a remark. The prohibition is, for erecting and keeping a ferry, for carrying passengers, &c., over *the said ferry hereby rated and established.*"

It is perfectly plain that the phrase " the said ferry," as here used, means the waters between Nassau and Manhat-

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tan Island, within the prescribed limits over which the ferry right is granted. An examination of the act of 1732, especially of the fourth section, will show this conclusively. The ferry granted is the right of transporting passengers, &c., from the city of New York to the Island of Nassau and back. The language of one clause of such 4th section is, "that they may establish and keep one or more ferries between the said city of New York and the Island of Nassau for the more easy transportation of goods *over the said ferry*."

The sound conclusion appears to be, that this grant to the Corporation of New York is exclusive, within the most rigorous rule which has been laid down in any of the cases. The power to grant an exclusive right, so as to restrain the sovereign authority from interfering with it, is admitted. The necessity, that such grant should expressly convey such right exclusively, is met.

Again—the law, which was established in the Courts of this State in the steamboat cases, remains the law of the State to this day, except so far as the Constitution and laws of the United States interfere with it. It is impossible not to see, in the State decisions, how entirely the great judicial minds of that day were imbued with the doctrine that private franchises were presumptively exclusive and inviolable; and that they who impeached them must show a plain intent of the Legislature to infringe upon them directly or indirectly, as well as a constitutional power to do so. (Livingston *vs.* Van Ingen, 9 John. Rep., 560; Gibbons *vs.* Ogden, 17 John. Rep., 488–9. See a collection of statutes, relative to ferry rights, in a note to Mr. Emmet's argument, 9 Wheaton, 97.)

The claim of the Corporation in this instance is no modern assertion of a novel right, but has been proclaimed and acted upon, from at least the year 1708. From the period

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when Corporate franchises of every nature were looked upon with favor, and guarded with jealousy, we are perhaps wandering into an opposite and dangerous extreme. The absorbing doctrine of public utility, and the arbitrary force of what is termed the eminent domain, threaten to merge respect for private rights in the magnificence of a speculation, and the sounding of a phrase.

There is one remaining view of this question. To understand it, one position before taken must be more fully stated.

The ferry right granted in the charter of 1686—in that of 1730—recognized in the act of 1732, and in all the subsequent statutes, was the right to establish ferries between Manhattan Island, from one extreme to the other on the one side, and on any part of Long Island opposite to such extreme points. If not so extensive on the Long Island side, yet it clearly comprehended the space between the Wallabout and the west point, being the extreme end, of Red Hook.

It was the whole privilege of ferrying over the dividing waters, between the one place and the other, within the limits declared. It was the absolute right of transporting or ferrying within such limits; not the mere right of establishing a boat to run from point to point, and restricting the ferry privilege as so established.

1. This appears from the act of the Common Council, of the 16th of November, 1691, "forbidding any one from transporting, for hire, any passengers or goods over the river, between the Wallabout and Red Hook;" an ordinance on which the acts of 1717 and 1732 were formed.

2. The charter of Lord Cornbury treats the ferry as being from the city of New York to Nassau Island, and from the said island to the city, distinguishing between this, and "the places where the ferry boats are usually kept and appointed."

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3. The exception in the same charter, giving l'berty to owners and inhabitants by the water side, within the limits and bounds aforesaid, to transport their own goods in their own boats, from the city of New York and Nassau Island, plainly shows the extent of the ferry right—that it was coextensive with the exemption.

4. It is true that the charter and the statutes employ the same term to indicate the ferry right at large, and the points and places at which it is exercised. They apply the term, however, comprehensively, as well as particularly; and the use in the latter sense can in nowise affect its import in the former.

The ferry right given is the whole franchise of ferrying over the waters between the points designated.

5. The statute of 1732, in the fourth section, presents this matter very clearly. "It shall be lawful for the Mayor, &c., to demand and receive the rates established by this act for transporting persons, &c., from the city of New York to the Island of Nassau, and from the Island of Nassau to the city of New York, *over the ferry*, in the ferry boats; and shall and may establish and keep one or more ferry or ferries between the said city and the said island. *Always provided*, that there shall be and remain one constant ferry at the present ferry, from Nassau Island to the city of New York, at some convenient landing place to the eastward of the slip called Wall street slip." See also the fifth section.

6. At a meeting of the Common Council, held February 17, 1774, to consider the subject of a sale of the ferry from this city to Nassau Island, it was resolved, that there should be three ferries fixed from the city side to the island, and the three landings were established, viz.: at Coenties slip, Fly slip, and Peck slip.

Again—if the State could interfere at all in destroying

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or impairing the franchise, it could only be upon the ground that public necessity or utility required it; and then only upon making full compensation.

1. This public necessity or utility could only arise on the ground that another ferry was necessary at a particular point within the limits. If the Corporation have established, or are ready to establish, or have not refused to establish, a ferry at such point, the reason on which the State can interfere fails entirely, and the private property cannot be taken.

The lowest possible form in which the compact with the State can be presented, is this: that the Corporation shall have the first privilege of establishing new ferries within the limits fixed in their grant. No statute can then take away this franchise, on the ground of taking private property for public good, unless upon a judicial conviction of the Corporation, working a forfeiture for neglect. The Corporation should first be called upon to fulfill the public duty, with which its right of property is connected. When its refusal is declared in a legal judicial manner, the right of the State to confer the franchise upon another may arise. But the fact of public necessity or high utility must first be made out, and the culpable neglect of the Corporation first declared, upon a hearing, in a competent tribunal.

The great case of The Canal Co. *vs.* The R. R. Company (4 Gill & Johnson, 1) is a strong and pointed authority for these positions. The opinion of Chief Justice Buchanan is among the ablest ever pronounced in an American tribunal, and is sufficient to determine the present cause in favor of the Corporation.

The case of The Corporation *vs.* Benson, involving the question which Judge Barculo left undecided, was argued before Judge Roosevelt, at the Special Term of the Supreme

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Court of the First District, in January, 1852. He sustained the right of the Corporation. The learned Judge did not deliver his opinion for publication.

Mr. Justice Davies, in his edition of the Laws Relative to the City of New York, printed 1855 (Appendix, p. 1264), speaks of this case before Justice Roosevelt, as that of The Mayor *vs.* Benson and others, decided in August, 1852, that he held that the rights of the Corporation were absolute and vested, and in the nature of private property, and that such rights were equally protected in ferries set up and established at the time of the passage of the act of 1845, as those which the Corporation might thereafter set up and establish; and that the license given by the Commissioners, under the act of 1845, conferred no right or title upon the licensees to set up and establish such ferries. He granted a perpetual injunction against the defendants.

The case of The People *vs.* The Mayor, &c. (32 Barbour's Rep., 102) was decided by Mr. Justice Hogeboom, at Special Term, January, 1860, and was affirmed at General Term, at the March Term, 1860. The case was of an application for an injunction to restrain the defendants from granting any lease of the Fulton, Catharine street, South, Hamilton avenue, and Wall street ferries, between the cities of New York and Brooklyn, and especially to restrain them from making the same in the manner proposed in the public notice of sale by the Comptroller. The Hamilton avenue and Wall street ferries were established after the act of 1845, all the others before.

The points decided by the General Term were, that the law of 1845, establishing a Board of Ferry Commissioners, was substantially repealed by the law of 1857, amending the charter. (Sess. Laws, 1857, vol. i., p. 888, § 41; p. 895, § 54.) As to the two last established ferries, it was

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immaterial whether their establishment by the Corporation was lawful (under the act of 1845), or not, since a grant or letting of them could now be made. A right now to establish and let covers the right now to let what is *de facto* if not *jure*, already established. The plaintiffs really did not question the power, but objected to the manner in which it was proposed to be exercised.

The grant of the ferry right, however derived, was either a delegation of the legislative power of the State, or a *proprietary right*. If the former, the letting was an act of legislative power and discretion, and Courts had no right to interfere with its exercise. If the latter, nothing but the plainest restrictions (even if there existed a right to restrict at all) would warrant the Courts interfering with a proprietor's right to dispose of his own property as he deems best.

Mr. Justice Hogeboom, in his opinion at Special Term, stated his views at length. He held, that the right to ferries is a right to property, and vests as such in the Corporation. The successors of the Crown cannot invade it. But such right was not more absolute and intangible than the property of an individual. It might be taken under the right of eminent domain. It was subject to taxation. It must be surrendered to government in whole or in part, when the public necessity, evidenced according to the forms of law, demanded it. That the public had a further right as to ferries, viz.: to regulate the rates of ferriage, and so to control ferry privileges in the hands of grantees or licensees. At least, the legal presumption is, that grants of ferry rights are conferred and accepted with such qualifications.

He held also, that the act of 1845, had it been in force, would have been a lawful exercise of legislative power as to all ferries attempted to be established after its passage;

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but not so as to ferries in existence at the date of the charter, or established between that time and the passage of the act. As to future ferries, the charter was a mere power, not a right in property.

This view, I have endeavored to show, in the remarks published long before its expression, is not a tenable one. With the greatest respect for the learned Judge, I submit those observations for consideration.

In relation to the power to *establish rates of ferriage*, it deserves notice, as confirming the learned Judge's opinion, that the charter of Lord Cornbury provided for the establishment of rates, by and with the consent of the Governor and Council for the time being. From 1717 to 1732 inclusive, Colonial acts were passed, regulating the rates. The acts of 1789, 1801, 1813, &c., also regulated them.

SECTION XI.

TITLE TO THE STREETS.

The nature and extent of the rights and powers of the Corporation in the streets of the city are of importance in numerous particulars; but especially so in three points of view.

First, Upon the question of reverter to adjoining owners, upon the closing of streets.

Next, As to the power of prescribing the mode of using them—of allowing vehicles of any description to be employed upon them—the restrictions, if any, upon that right; and the power of imposing conditions, and what, upon any grant of a particular mode of using.

Lastly, In relation to the power of the Legislature to abridge, or take away, the estate or authority vested in the Corporation as to the streets.

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It will be at once seen how extremely important it is to ascertain whether the Corporation have a fee in the soil occupied for streets, even if coupled with a trust—or whether they possess nothing but a police power.

Historical notice.

The history of the acquisition of any estate or power in, or in relation to, the streets, may be divided into four periods: the *first*, from the settlement of the city to the surrender to the English in 1664; the *second*, from that time to the charter, 1686, and the colonial act of October, 1691; the *third*, from that date to the great system under the act of 1807, laying out the avenues and streets, and the statute of 1813 consequent upon it; and the *fourth*, from that time to the present.

I. From the facts and the law connected with the first period, it is considered that two propositions may be sustained:

1st. That the right and title to the soil occupied by any street in the city, opened and used prior to the surrender in 1664, were vested in the Dutch government—passed to the English crown or government, and passed from that crown or government, or else from the State of New York, to the Corporation of the city, and now vest in it.

2d. That an estate in fee to the soil of any street opened after 1664, and opened through lands comprised in a grant of the Dutch government made before that date, has become in like manner vested in the Corporation. That it is so vested, whether such street was opened by public authority, with or without compensation to the owner; and also whether the street was first laid out as a private way, and afterward accepted as a public street, or was originally laid out as a public street. I regard this rule as applying to every street laid out, down to the year 1813.

Under the charter to the West India Company of June 1621, the organization of the government of New Nether-

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lands was this: The separate Chambers appointed for the several cities, Amsterdam and others, possessed in the first instance, and represented, the whole power of the company. That power, however, was delegated to the Assembly of Nineteen, consisting of delegates from the several cities entitled to Chambers. This assembly had power to appoint a director and council for each colony.

By the articles of Freedom and Exemptions of 1629, a modification of this absolute power was, to a slight degree, permitted. As to the first colony settled, the undivided domain was to continue in the States-General and Company; but on another being established, they might, with the first, appoint one or more council, to confer upon what should be necessary. It was also declared that it was intended to people the Island of Manhattans first.

With this modification, which was indeed only the establishment of a council of advice by the colonists, the absolute and plenary power of dominion was placed in the Director-General, with his own council. The Judicial, Legislative and Executive authority were thus conferred, with the right to appoint all inferior officers necessary to carry on the government.

Law of the colony.

But the law of the colony, which the Director-General was to administer—the rules which were to govern the rights of property and persons—were the regulations given by the company through the Assembly of Nineteen; and where the case was not thus provided for, nor fell under an ordinance or regulation of the Director-General, then the law of Holland prevailed, and was the rule of action.*

This law consisted of the Roman law, the imperial statutes of Charles V., and the edicts, resolutions and customs of Holland.†

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* *Ante*, p. 98.

† Encyclopedie Raisonnée. Tit. Droit. Van Leuwen Introduction.

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This law the colonists brought with them; and by it, except in cases where it was inapplicable to their situation, they and their property were controlled.

Law as to streets.

It is the undoubted rule of that law, that highways, *viæ publicæ*, belong to the sovereign power, as part of the royalties or public rights. They belong to it absolutely. There is no right in the adjacent owners to the soil of the road, either during the use or upon a discontinuance.*

* Digest 3, 8, 2, 21. Merlin Repertoire de Jurisprudence, Tit. Chemin, vol. 4, p. 118. A qui s'appartiennent les Chemins Grands? The author refers to the decree of the Emperor Frederick, quæ sunt regalia, as decisive; and also to the 538th article of the Civil Code. Renthrop *vs.* Bourgh (3 Martin Louisiana Rep., 97—Code of Louisiana, Art. 700–703). I also refer to the compression of the learning of the great Publicists Grotius and Puffendorf, in Taylor's Elements of the Civil Law, pp. 463 and 472. Tit. Res Publicæ.

Nowhere, however, is the rule more distinctly laid down than in the Frederickian Code, vol. i., pp. 401–402. "No right can be assumed to highways, but that of passage, for they belong to our royalties." The case of the destruction of a road by a flood is put, and it is declared that the former owner cannot resume it.

The distinction between rural predial services, and public highways or roads, is strongly marked. Vander Linden (on the laws of Holland, ch. xxi., Book ii.) is full of examples of the former class. They are such as foot-paths, riding-paths, driving-paths, &c. Highways or water may be used by the public in general. Chapter xxii. shows the manner in which such servitudes are lost. These passages clearly refer to civil law servitudes, what we would term rights to private ways. "When any person's land has no passage to the king's or public highway, or parish road, a sufficient way is assigned to him by the magistrate."

The digest is very particular in defining these various public and private ways. In Liber 43, Tit. viii., 21, 22, 23, it is thus stated: We call that a public way, of which even the soil is public; for we do not consider the public and private ways to be the same. In private ways, the soil is in another, only the right of passing and using it belongs to the neighborhood; but as to public ways, the soil is in the public, settled by certain boundaries by him who has the public right, that they may be publicly passed over and used. Some ways are public; some are private, and some vicinal. We call public ways what the Greeks call basilicas—that is, royal. Some call them pretorian, and some consular ways.

Chancellor Kent, in his Commentaries (vol. iii., p. 433), says: By the law of Louisiana, which in this respect follows the civil and not the common law, the soil of public highways is in the public.

See also Renthorp *vs.* Day (4 Martin's Lou. Rep., 97).

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This rule, as to public ways, rested upon the same principle as that in relation to navigable streams, in the enlarged meaning of that phrase in the cival law, that is, all streams not exhausted at particular periods of the year; and as to such streams, our decisions abound with the recognition of this being the rule of the Civil Code.*

Under this rule, whoever accepted a grant from the government, did it with the knowledge that it was subject to the exercise of the right of taking a part of the land for highways. He regulated the price he gave to government accordingly; and as there is not in the civil law a trace of the notion of reverter upon a discontinuance, the price or compensation could not have been affected by such an expectation.

It is a striking fact that this very rule is embodied in one of William Penn's conditions to settlers in Pennsylvania; and hence the courts of that State hold that under this provision, even supposing it could not otherwise be done, the land may be taken without compensation. (6 Binney, 509).

Proceedings by the Dutch.

The proceeedings of the Dutch government in relation to the streets of New Amsterdam, which I have been able to trace, are the following:

On the 25th of July, 1647, the Director-General and Councillors passed an ordinance, reciting the disorderly practices of building houses and extending house lots far beyond their lawful limits, and of putting up hog-pens along the public roads and streets. Three surveyors were thereupon appointed, to condemn all such irregularities.

No building or palisade was to be made without the

* The Chancellor's admission in the Canal Commissioners *vs.* The People (5 Wendell, 444), Senator Beardsley's able opinion in the same case. Senator Verplanck in Kempshall and the Commissioners of the Canal Fund (26 Wendell, 404).

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consent of these surveyors. There was a penalty affixed, and a power of removing the obstructions conferred.

On the 15th of January, 1655, officer Tienhoven complained that Jacob Steedman had erected his house opposite old Jan Van Cowenhoven's, wholly out of the line of the street, without the consent of the fence-viewers, or the worshipful court. Two members were appointed to visit the building, and regulate the same.

By the sixth article of the conditions granted by the city of Amsterdam, in 1656, it was agreed that the city should provide and lay out a proper piece of land by the river side, for the use of the colonists, and fortify the said land with a trench without, and a wall within, and divide the inclosed land into streets, a market, and lots suitable for the service, as well of those who carry on merchandise, as of farmers.*

And by the 10th of such articles, the city of Amsterdam was to divide all the land round about the aforesaid town or city into suitable fields for plough-land, pasture and meadow-land, and make proper allowance for roads.†

On the 15th of January, 1658, an ordinance was adopted by the Directors and Council, in which it was recited that many large and spacious lots lay vacant and unimproved, being held in reserve by parties for their pleasure or profit, who will not build thereon, contrary to the intention and meaning of their High Mightinesses, the Directors of the Privileged Company, Lords and Patroons of the Province, as the first donors and grantors of these lots. That it was necessary that these lots should be built on, as was expressed in the granted ground-briefs. That the Director-General and Councillors, through their sworn surveyor, with the assistance of the city, at the arrangement of the streets, surveyed the vacant and unimproved lots, and found some

* Collections Historical Society, vol. i., p. 292. † Ibid.

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hundred lots within the city unimproved. The ordinance directed a yearly tax to be imposed upon the owners of all lots which should remain unimproved.*

But the most important of all the documents of this period was the following:†

"At a meeting of the Lord Director-General and Lord Councillors of New Netherlands, on the 25th of February, 1656, an order was made as follows: 'Having this day resumed the survey of the streets of the city as they heretofore, in the assembly of the Director-General and Councillors of New Netherlands, were designed in the map or plan, and laid out or set off into streets, with palisades according to the same—the Director-General and Council confirmed forever the survey aforesaid, without changing the same. Therefore the advancement of the same was referred to the Burgomasters of the city. They were directed to affix a notice and determine a time at which all and any who might be abridged or injured by the aforesaid survey, should inform the Burgomasters of the extent of their damage, and to agree, for the advantage of the city, on the lowest price. If they could not agree, then to refer the same to two or three honest persons not interested; which done, the Burgomasters shall calculate the aforesaid lots according to the return, and appraise and distribute them among those disposed to build. But where those interested prefer to build upon the lots thamselves, according to the survey, when they have opportunity, they shall remain, in the mean time, owners and possessors of the gardens and lots falling without the lines of the streets, until they are paid therefor according to valuation; and in case of the vacant lots falling short at the distribution, others shall be demanded; reserving to the Burgomasters

* Records Clerk's office, C. C., New York.

† Records Burgomasters and Schepens, vol. ii., p. 362.

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to determine what streets and lots shall be first built on, only that, according to ancient usage, the deeds therefor shall be obtained from the Director-General and Council.'"*

Some proceedings of the Dutch authorities will illustrate this ordinance.

"On the 7th of October, 1656, an order was passed, reciting that the fence of the garden of Gilles Peterson and Isaac Kip, near the city gate, by the East River, was standing too near the city wall; that it was formerly cut off by the general survey of the city. They were ordered to take in the fence provisionally, that wagons and horses may pass. For what has formerly been cut off, you shall receive satisfaction on the valuation of arbitrators."

On the 3d of May, 1657, there was an application for payment of damages occasioned by the late survey. This was made by Abraham Verplanck and others, heirs of Ariana Cuilye.

Allord Anthony made a similar application, on account of the running through his garden. Johannis Nevins and Madalene Vincent also applied, and their cases were referred to arbitration.

It was also ordered that the fences should be regulated according to the general survey.

Entries of the 20th December, 1657, show that the lots on the Smith street (*De Smee straat*) were numbered upon, and sold by, a map. I presume this was the map of 1656.

On the same day the Burgomasters addressed a request to the Director-General for an act granting them the dis-

* This survey seems wholly lost, much to the regret of New York antiquarians. The Council at Amsterdam, in 1657, say: "We are gratified at the sight of the map of New Amsterdam, expressing the opinion that too large spaces were left for gardens, particularly in the Grove street, the Princess Graft, Princess street, and the Beaver Graft, the Thuyn street and Heer street."—*Holland Documents*.

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posal of the lots not mentioned in the ground briefs, and still ungranted. On the 20th January, 1658, an apostile was received from the Director-General and Council, in which, among other things, they say, " that the Director-General and Council have granted to Burgomasters the unconceded lots within the city walls. The walls, it will be remembered, was the line of palisades and fortifications on the northerly side of Wall street, running from river to river, and bending across and west of Broadway, somewhat to the south. This line was made in 1653.

These historical notices establish, that before the year 1647, various streets had been laid out in the city, and obstructions upon them were removed by public authority, and the offenders punished. That in the year 1656, a general and permanent survey and establishment of the streets took place. In doing this, some alterations were made, and new pieces of land were thereupon taken. These pieces were parts of inclosed or improved lots, such as gardens; and a compensation was awarded to the owners for such strips.

The other branch of the ordinance of 1656 related to the enforcement of a condition contained in the ground-briefs, that the grantees should build and improve.

The compensation which was made to owners, when pieces of improved ground were taken upon altering the old street, certainly does not weaken the position that the Dutch government became the owner of the soil of all the streets in absolute propriety; and I apprehend no lawyer will contest the proposition, that as to every street laid out prior to the surrender in August, 1664, this was the state of the title. If the Government could have taken new strips without allowing anything, it was by force of the doctrine of eminent domain in its most unbounded sense; if only upon rendering compensation, then the pub-

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lic acquired the title, and brought the street as a *via publica* within the universal civil code.

The examination which I have given of the records and documents shows that most of the streets now known and open below and including Wall street, were open in 1664. Some variations, indeed, were made from time to time, and considerable changes took place after the fire of 1835.

Every street opened below Wall street, prior to 1686, was opened through land held under a Dutch ground brief by individuals, or held by the Corporation, under the apostile of 1658, or by the Dutch Government, or their English successors, of reservations for public purposes. The fort and grounds, the Company's warehouses, and the old burying ground were of this last description. And every street since opened or varied within those limits, has been opened or changed through lands similarly situated.

Effect of the surrender of 1664.

There cannot be the least ground for supposing that the surrender of 1664 operated so as to transfer the title of the Dutch government in the streets to the adjacent owners. It can scarcely be necessary even to discuss the proposition. Then, as no royalty, title or interest, eminent or private dominion remained in that government, and such dominion necessarily vested somewhere, it must have gone to the British power; and by the principles of the British constitution, that power was the crown.

Nor can it be conceived that the surrender had such an effect as to pass the right and interest from the crown to the adjacent owners. No intendment can be made against a State to divest its property or power.

And again, if we consider it in connection with the subsequent confirmatory grants of the English governors, we cannot find the least countenance for the idea of such a transfer. Independently of the limited effect of these confirmations, as a bare change of feudal allegiance, we could

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not regard such confirmations in a higher light than original grants; and by grants of the State, no title to a stream or highway passes, even if language is used, which between individuals would convey it. The grant is construed most strictly against the grantee.*

I think it may be considered as a very clear proposition, that the title in fee to the soil, in all the streets opened prior to 1664, passed from the Dutch to the English sovereignty; and under the patent to the Duke of York, passed to him as a royalty, and from him and the Crown to the people of the State, unless the right went to the Corporation, under the Dongan charter. Supposing, however, it went to the people, it is hereafter shown, that by an act of the Legislature of 7th March, 1793, they passed it to the Corporation.

II. The next proposition stated, as arising out of grants made by the Dutch Government, was, that an estate in fee vested in the existing government, as to all streets opened after 1664, through lands granted by ground briefs of the Dutch Government.

I have before shown, that the ground briefs were valid sources of title, even without an English confirmation. The lands covered by such briefs were granted and held, at the period of the surrender, subject to the right of the public authority to lay out streets through them, with or without compensation, and were held subject to the settled rule, that where streets were so laid out, the fee in the soil passed to the government. The English succeeded to the public rights of the Dutch. I cannot conceive a just reason for supposing that this substitution changed the character of the tenure in this particular. Admit to its utmost

* Charles River Bridge *vs.* Warren Bridge, 14 Pet., 544; La Plaisance Bay Co. *vs.* The City of Monroe, Wallace's Rep., 167; Hogan *vs.* Campbell, 8 Peters, 9; Smith *vs.* Lansing, 4 Wendell, 28; Martin *vs.* Wendell, 16 Peters, 307.

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extent the doctrine of the English publicists, that the surrender was a restoration and not a conquest, and that the whole legal consequences of a title by discovery attached to the colony, yet indisputably the right of property under Dutch grants was saved and guaranteed by the article of surrender referred to; and as every essential estate and right of the grantee remained unimpaired and the same, so every condition or burthen attendant upon that estate continued unchanged. I regard it as a necessary conclusion, that grantees were to hold thereafter, with the same public servitudes, because they were to hold with the same rights.

Nor do the cases in relation to rights on the banks of our inland waters conflict with this view.* If it is to be considered, as I presume it is, that the common law doctrine of the ownership by adjacent proprietors, applies to such waters, yet the case differs widely from the one in question. The land here was acquired and held originally subject to a public servitude; and the question is, whether that has ever been extinguished or released.

I submit, then, that it is established, that the fee to every street opened at any time after the surrender, and opened through land comprised in a Dutch ground-brief, vested in the then existing government, or its grantees, unless a different rule has been established by express law. None such, I am persuaded, can be found.

We are thus brought to the grant in the charter of Dongan, of 1686. By the second section, there was granted, ratified, and confirmed unto the Mayor, Aldermen and Commonalty of the city "all and every the streets, lanes, highways, and alleys within the said city of New York and Manhattan Island aforesaid, for the public use and service of the said Mayor, Aldermen and Commonalty and travelers Charter of 1686.

* 5 Wendell, 444; 17 Wendell, 573; 16 Wendell, 404; 4 Wendell, 369.

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there; together with full power, license, and authority to the said Mayor, Aldermen, &c., and their successors forever, to establish, appoint, order, and direct the establishing, making, ordering, laying out, amending, and repairing of all streets, lanes, highways, alleys, water-courses, ferries, and bridges in and through the said city of New York and Manhattan Island aforesaid, necessary, needful, and convenient for the inhabitants of the said city and Manhattan Island aforesaid, and for all travelers and passengers there. Provided always that the said license so as above granted for the establishing, making and laying out of streets, alleys, highways, ferries, and bridges be not extended, or be construed to extend to the taking away of any person's right of property without his or her consent, or by some known law of the said province."

Under the first clause of this grant, the whole title and right of the crown of Great Britain in the existing streets and highways of the city passed to the Corporation. The right to the soil was in the Dutch government, and passed to the Duke of York as a royalty; that is, it was a public trust, to be employed for public benefit and use. No proposition seems more clear than this.

The next clause of the charter contains a delegation of the whole power of the crown to open, alter and amend streets, but with a restriction upon that power, so that land could not be taken without the owner's consent, or by some *known law of the province.*

The latter phrase must be considered in relation to streets to be opened through lands covered by the ground-briefs; next, through lands derived immediately from the crown; and again, through lands belonging to the city.

If the view of the urban servitude attached to all lands covered by the ground-briefs is correct, the occupation of such lands for streets was under a known law of the pro-

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vince. As to the next class of lands, the Assembly of 1683 was, as it is well known, the first introduction of a representative system in the colony; and I do not find any law passed upon the subject between that year and 1691.

Such streets as were opened between 1683 and 1691, it may be presumed, ran through ground comprised in the ground-briefs, or which had been ceded, or were run over public land.

The streets, if any, which were run through land belonging to the city, of course continued in the city; and it is hereafter sought to be shown that a subsequent grant by the Corporation of an adjoining lot bounded on it, could in no case pass the title.

A *known law* of the province, to govern this power, was adopted in the act of October 9, 1691.* That important statute is entitled, "An act for regulating the buildings, streets, lanes, wharves, docks, and alleys of the city of New York."

By the first section, the Mayor, Aldermen, and Commonalty were to appoint a surveyor or surveyors of the buildings, streets, lanes, docks, wharves, and alleys of the city, to see that the same were laid out with uniformity, according to such rules and orders of building and laying out of streets, lanes, wharves, docks, and alleys, as shall be established by the said Mayor, Aldermen, and Common Council, who are hereby authorized and empowered to make such rules and orders for the regulation of such buildings, and also for such streets, lanes, &c., as shall be found convenient for the inhabitants.

The second section was in substance as follows: Whereas, in the laying out of the new lots for building, some controversy may arise by a lot or lots of ground, which, if built upon, would be very incommodious and prejudicial

* 1 Smith & Liv., 12.

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to one of the principal streets of the city, and hurtful to the trade and health of the inhabitants: Therefore, be it enacted, that the Mayor, Aldermen, and Commonalty, in Common Council assembled, shall and may, and are hereby, authorized to obstruct any building or buildings that may narrow the said street, or any other street within the said city. And the said Mayor, Aldermen, and Common Council shall and may continue the street commonly called the Broad street, according to its present dimensions; and if, in the doing thereof, *or in* laying out for the future any streets, lanes, docks, wharves, alleys, &c., they *do take any person's grounds*, they are to give notice to the owners and parties interested in the ground to be so taken for the intent aforesaid. And to the intent that reasonable satisfaction may be given for *all such ground* as shall be taken and employed for the uses aforesaid, the Commander-in-chief and Council *may assess the value of the lots* now in controversy, and for other ground the Mayor, Aldermen, and Common Council shall and may treat and agree with the owners and others interested therein. If no agreement was made, then the Mayor and Aldermen, in their court, were to summon a jury before the said court of the Mayor and Aldermen, to inquire and assess such damages, and recompense as they shall see fit, to be awarded to the owners and others interested, according to their several and respective *interests and estates in any such ground, or any part thereof, for their respective interests and estates in the same*, as by the said Mayor, Aldermen, and Common Council shall be adjudged fit to be converted to the purposes aforesaid.

"And upon the verdict of the jury, and judgment of the court, and payment to the owners and others having estates and interests, or tender of the amount, the judgment shall be binding upon and against the parties, their heirs, executors, and assigns, and others claiming any title and

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interest to the said ground; and shall be a full authority to the Mayor, Aldermen, and Common Council to cause the said ground to be converted and used for the purposes aforesaid."

The third section related to the pitching and paving of streets, making sewers, drains, &c.

And by the fourth section, "nothing herein contained shall be construed to change, alter, straighten, lengthen, narrow, or enlarge any of the streets, alleys, or lanes within the city as they are now laid out and remain at the publication hereof; nor to break through any person's ground, now in fence or inclosed, or to take any person's house or habitation."

This important statute continued in force until April 16, 1787. It was then superseded by an act of the State.* But this law contained almost identically the same provisions in its first and second sections, as in the first and second sections of the act of 1691. And this law remained in force until the great change in the system consequent upon the act of April, 1807, and carried out in the 177th and other sections of the act of 1813.

The first observation which occurs upon this statute is, that the whole estate, right, title and interest of every party claiming the land, was to be appraised and paid for, and the lands and all the estate therein upon such payment or tender, was judicially condemned.

Next, the prohibition as to running through land fenced or inclosed appears to have referred only to land so fenced at the date of the act. But as to houses, the provision appears to have been prospective and general.

Again, this great principle of the statute as to a compensation to owners was now for the first time introduced into colonial, or, I believe, into English law, upon streets

* 1 Greenleaf, 441.

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and highways. The highway acts of the province and State, for a long course of years, are without it.

The operation of this statute, and that of 1787, may be considered in its application to streets of different classes.

1st. All the old streets, as they existed in 1691, were to remain unchanged. The Common Council could not alter them—a particular act of the Legislature was necessary.

2d. But the statute applied to streets run through any parcel of ground included in a ground-brief of the Dutch Government, confirmed by the English.

3d. Next to streets run through lands granted in the first instance by the English authority.

And in either case streets were acquired by the city in one of these modes—

By the verdict and judgment of the Court, under the act of 1691 and 1787; or by agreement between the Corporation and owners, and a cession of the land to be taken upon a consideration; or again, by the adoption as a public street of a way laid out by the owners through their private lands. Generally it will be found that in the latter case, within the period now treated of, cessions of the land were made.

The law of 1787 continued in force until the act of 1807, and to a considerable extent until 1813.

Before proceeding to consider the facts and law arising under these different classes, the remaining statutory provisions should be referred to.

Act of 1793. By an act of the 7th of March, 1793 (§ 111), it was provided, that all the estate, right, title, interest, claim, and demand whatever of the people of this State, of, in, and to all lands heretofore, at any time, left for streets or highways, in the city of New York, by any person or persons whomsoever, shall be, and hereby is, vested in the Mayor, Aldermen, and Commonalty of the city of New York, and their successors, for the use of streets and highways.

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This section is re-enacted in the 192d section of the act of 1813.

I understand the term, *left for streets*, &c., to be equivalent to *taken out* for streets, or appropriated.

The law of April 9, 1807 (Session Laws, 30th session, chap. 115), appointed Gouverneur Morris, Simeon De Witt, and John Rutherford, Commissioners of Streets and Roads, for the purpose of performing the duties prescribed by the act. Act of 1807.

The 4th section provided, "that it should be lawful for the said Commissioners, or any two of them, and they shall have and possess exclusive power to lay out streets, roads, and public squares, of such width, extent and direction as to them shall seem most conducive to public good; and to shut up, or direct to be shut up, any streets or parts of streets which have been heretofore laid out, and not accepted by the Common Council of the city of New York, within that part of the said city to the northward of a line, commencing at the wharf of George Clinton, on Hudson River; thence running through Fitzroy road, Greenwich lane and Art street, to the Bowery road; thence down the Bowery road to North street; thence through North street in its present direction to the East River. And no square or plot of ground made by the intersections of any streets to be laid out by the said Commissioners, shall ever, after the street around the same shall be opened, be, or remain divided by any public or open lane, alley, street or thoroughfare."

The maps and surveys to be made by the Commissioners, were to be filed, one copy in the office of Secretary of State, one to belong to the Common Council of the city, and one to be filed with the clerk of the city and county.

By the 8th section, the plans and surveys of the Commissioners, or any two of them, in respect to the laying

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out of streets and roads within the boundaries aforesaid, and the maps of the same, so to be made by them, or any two of them, as aforesaid, shall be final and conclusive, as well in respect to the said Mayor, Aldermen, and Commonalty, as in respect to the owners and occupants of lands, tenements, and hereditaments within the boundaries aforesaid, and in respect to all other persons whomsoever.

And the 9th section provided, that whenever the Mayor, &c., should be desirous to open any street, road, or public place so to be laid out, it shall be lawful for the said Mayor, &c., to agree with the owner or owners of the lands, tenements, and hereditaments, as will be required for that purpose, for and about a reasonable compensation to be made to him, her, or them, for such lands, tenements, or hereditaments; and in case of disagreement, or infancy, incapacity, or absence, to apply to the Supreme Court for the appointment of commissioners to estimate the damage of such owners. Other provisions ensue; and it is declared, that upon such assessment being completed, the said Mayor, Aldermen, &c., shall be and become seized in fee of all such lands, tenements, and hereditaments, and thereupon the said Mayor, &c., may take possession of the same, without any suit or proceeding at law for that purpose; in trust, nevertheless, that the same be kept open for a public street, road, or public square, forever.

It is unnecessary to refer more particularly to the act of 1813, in this connection, further than to state, that after providing the system of commissioners, applicable to streets not included in the map of 1807, as well as those included in it, it contains a clause vesting the fee of the lands taken in the Corporation, upon the confirmation of the report, and authorizing a summary possession to be taken. "In trust, nevertheless, that the same be appropriated and kept open for, or as part of, a public street, avenue, square, or

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public place, forever, in like manner as the said public streets, avenues, squares, and places of the said city are, and of right ought to be."

One other statutory provision should be referred to.

By the tenth section of an act of April 2, 1803 (Sess. Laws, 25th sess., chap 70), it was provided, that no new street should thereafter be laid out in the said city, except with the approbation and permission of the Mayor, Aldermen, and Commonalty, in Common Council convened; and if any street should be laid out without such permission, it should be lawful for the said Mayor, Aldermen, &c., by by-laws or ordinance, to direct the same to be stopped up, and all buildings adjoining thereto to be removed by the proprietors or occupants, within such times and under such penalties as they shall think proper.

This act remained in force, at any rate, until the revision of 1813. It was in its terms prospective.

By the 11th section of the same act, all streets, not already named and opened, should be considered new streets within the meaning of the preceding section.

The streets of the city, with a view to the question of title and use, may be classed, as was before observed, thus:

1st. Streets opened under the system established by the act of 1807, with its numerous variations in subsequent statutes, and when the proceedings are conducted pursuant to the provisions of the act of 1813, and its amendments.

2d. Streets opened under the act of 1691, and its renewal in 1787, and pursuing their provisions.

3d. Streets opened under the Dutch government prior to the surrender in 1664.

4th. Streets opened by individuals through their own lands, and finally adopted by the Corporation as public

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streets; and either formally ceded, or adopted by unequivocal acts, and used as such.

The second and fourth of these classes may be considered —first, in relation to lands covered by the Dutch groundbriefs; next, in relation to land granted directly by the English government; and lastly, in relation to lands granted by the Corporation to individuals.

5th. Private ways or streets opened by individuals, and never accepted or taken as public streets.

I. I apprehend that the points which may be considered as settled in our courts, are the following:

The question where the fee of land in a street adjoining grounds sold in the city of New York vests, varies in the following cases. I speak of deeds containing words which, in the case of highways in the country, would carry the grantee to the middle of the way.

1st. If a grant of land bounds upon a street, laid out on the map of 1807, and the land in the street is owned by the grantor, the fee does not pass. It remains in the grantor, and when the street is opened, compensation, though nominal, must be made to him.

2d. If the grant bounds upon a street, not laid out upon the map of 1807, or by the statutes changing it, but it is subsequently taken and opened by the Corporation under the act of 1813, the same is the result.

But in both cases, having bounded the grantee upon what becomes a public street, the grantor has given an easement over the ground which is perpetual, and renders his fee of but nominal value. Still it is the fee, and must be extinguished by paying him a sum of money, and thus transferring the fee to the Corporation under the act of 1813.

3d. But if a street has been opened by an owner through his own land, and such street is not taken by the Corporation as a public street, but under proceedings, or by the

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force of the law becomes closed, then the grant is to be construed as transferring the soil to the middle of the street.

That these are the results of what are termed the street cases, and of the decisions of the Superior Court of New York, will, I think, be apparent upon a brief review of them.

We must notice that the Supreme Court has, from the beginning, been consistent in holding, that the fee in the two first cases above stated, continued in the grantor. The inconsistency which the eminent counsel, in one of the Superior Court cases, dwelt upon, was merely in holding, in the first place, that the fee was to be considered as of the full value of the land; while afterward the Court treated it as but of nominal value.

In the Mercer street case (4 Cowen, 423), the court held, that the grantor, who had conveyed lots bounded on Mercer street, retained the fee, and was entitled to payment of the full value of his land, notwithstanding his grant.

In the Sixteenth street case (1 Wendell, 262), the same doctrine of ownership was adhered to; but it was so far modified in its application, as that the value of the fee to the vendor was held to be nominal only, by reason of the easement granted to the purchasers.

In the Lewis street case (2 Wendell, 472), the Court expressly say—That they adhere to the doctrine that the fee in a street of the city does not pass to the purchaser of lots bounded on it, as it would do in the case of a boundary on a public highway; and they lay it down explicitly, that whether the boundary is on a street, laid out by the Commissioners of 1807, or on a map made by the owner of lands, in reference to which sales are made, the grantor retains the fee of the land, subject to the easement.

See also Livingston *vs.* The Mayor, &c. (8 Wendell, 85),

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relating to Attorney and Ridge streets, both of which were south of the lines of 1807.

Again, the subject was considered in the Thirty-second street case (19 Wendell, 128). The map by which sales had been made designated the streets and avenues as they had been laid down on the map under the statute of 1807. In the conveyances, the purchasers were bounded on the streets. Judge Bronson says: "If we stop here, it is then a settled question that the grantee was only entitled to a nominal sum for the fee of the land in the site of the street, when it should be taken by the Corporation; and had he sold the land in the street to a third person, his grantee would have had no greater right."

This was followed by the Twenty-ninth street and the Thirty-ninth street cases (1 Hill, 189 and 191). In the former, Justice Bronson says: "Having sold lots and bounded the purchasers by the streets, as it is laid down on the city map, he has adopted the map, and dedicated his land in the site of the street to the public use." He considered that the dedication as a public street extended to all his lands in the same block; or, in other words, to the next cross street or avenue on each side of the lots sold.

In the latter case, the grant was to the centre of the street; but referring to the map, it showed the intention of both the grantor and grantee, that the street should be a public street.

The principle of the decisions is also settled to be, that the selling lots by a description bounding upon the streets or avenues of the map of 1807, is an adoption of the map, and a dedication of the land in the street to the public use. And so if the grantee is run to the centre of the street, but takes it by a reference to the map, he takes it in like manner as the grantor held it, and is entitled only to nominal damages.

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The decision in Livingston *vs.* The Mayor, in the Court of Errors, related to streets (Ridge and Attorney), laid down on a map of 1803. The Chancellor distinctly recognized the fee being in the grantee. He says: "All that the grantor had a right to claim was the value of the streets, subject to the right of his grantees to have them permanently kept open; in other words, the mere value of the legal title, subject to the easement or urban servitude." (8 Wendell, 99.)

It may be noticed that in White *vs.* Flannigan (1 McGruder's Maryland Rep., 539) these decisions of our Supreme Court are recognized and approved.

The cases in the Superior Court rest upon a totally different principle.

In Jones *vs.* Carman (2 Sand's S. C. Rep., 234), a grant was made in April, 1806, in which one of the boundaries was, "southerly by the northerly line or side of Thomas Burling's lane." It was held that no part of the lane passed. The distinction was taken between a boundary *along a road* or upon *a road*, or *running to a road*, and where the description is *along the side of a road*. In the latter case, the grant is restricted, and does not extend to the centre. The learned Judge refers to the previous decisions in that court, and says: "We also held that this rule of construction applied to city lots as well as to farms in the country. In some of the reported cases of applications to the Supreme Court to confirm assessments, it is intimated, that in respect to this rule of construction, there is, or may be, a distinction between city lots and country farms; but we expressly repudiated such a distinction."

In Herring *vs.* Fisher (1 Sandf. S. C. Rep., 344), the case was this: Elbert Herring died, seized, in 1773, of a tract of land. There was an agreement, in 1784, between the heirs and others entitled under him, to lay out a road

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or highway three rods wide, between their lands—each party to contribute half. "To be opened when the parties, or either of them, think fit, and, when opened, to be and remain a public and common highway."

The description in the deeds in question, being carefully analyzed by the learned Judge, led to the conclusion, that by their true construction, and under the cases respecting highways, the centre of a certain street was included. He adds, that had the terms been less explicit, yet the decisions as to boundaries along highways would have carried the grant to that extent.

Adverting to the street cases, he observes, "that the Court was not determining the construction of a conveyance of city lots, but of a country farm. The Herring farm, at the date of this conveyance, was literally in the country, and Amity lane, when first laid out, and for many years afterward, was nothing more than a country road."

The Court, however, do state, "that it cannot be questioned, that by the dedication of Amity lane as a public road, and the long continued use of it as such, it became a public highway in the ordinary and legal sense of that term."

With great respect, this scarcely seems warranted by the facts in the case. There does not seem enough to establish an adoption by the Corporation as a public street. The public use is not sufficient. The authorities upon this point are hereafter stated.

Again, there is strong evidence, out of the case, to show that it never was so adopted.

In July, 1831 (Board of Assistants, Doc. E, p. 332), the subject of Amity lane was much considered. An elaborate opinion was given by the then counsel (the present Judge Emmet), in which he traced its history. He refers to the deed of 1784. He observes that such deed did not create

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the lane a public highway—that he could not discover it was ever so opened, at least until a few years past, not enough to make it a highway in law, &c. He quotes an opinion of Ogden Edwards, Counsel of the Board, given in 1823, that Amity lane had never been a public road or highway, and could not be treated as such. He adds the opinion of Judge Ulshoeffer, when counsel, given in 1825, to the same effect.

Mr. Emmet adopted these conclusions, and was of opinion that the act of 1818, as to closing streets, did not apply to a private road or lane. He recommended that it be first opened under the act of 1813, and then such portions of it, as might be thought proper, could be closed. This led to the closing in 1833, noticed by the Court.

The Court adverts to a resolution of the Corporation, in 1806, as showing that they considered it a public street. But at that time, the act of April 2, 1803, was in force; and that act particularly applied to private roads, and gave the power of closing them. (See the act, *ante*, p. 271.)

The other case in the Superior Court, Hammond *vs.* McLaughlin (1 Sand. S. C. R., 340) was, in like manner, the case of a strip in a street (Catharine street), never adopted by the Corporation, but closed up by legal proceedings.

It must be examined whether the street cases do not actually involve a judicial determination of the point, instead of mere intimations of opinions.

The statute requires an estimate and payment of the loss to all the owners, lessees, and parties interested in the land to be taken. Unless this is done, the act is not complied with, and the soil for the street is not legally taken. The Supreme Court say, the soil is in the grantor, in the cases referred to; and, although of little value, one dollar must be at least allowed and paid to take it from him, and

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vest it in the city. But if the fee is not in the grantor, but in the grantee, and no allowance is made to him, his title is not divested; and the consequence would be, that a vast number of the streets opened in the last twenty years have been opened without complying with the statute, and opened illegally. The Supreme Court had to say explicitly in whom the fee resided to legalize an opening, and they have said so.

And all that can be said of the case of Child *vs.* Starr (4 Hill, 489), is that the Court of Errors would not carry the principle of the street cases so far as to apply it to the claims of riparian owners on inland streams running through a city.

In every street then opened under the provisions of the acts of 1807 and of 1813, the fee in the soil is vested in the Corporation. It is divested from the original owners. It may be that it is still a qualified, determinable fee, so as that, upon closing the street by public authority, the soil may revert. This question will be afterward examined. But, subject possibly to this modification, the fee is entirely placed in the Corporation. But it is so vested in trust for the use of the inhabitants and travelers. Here is the definition of the object, and the limitation of the power. What is a lawful exercise of the trust, and what a breach of it, has of late been the subject of much judicial decision. It is hoped that the point will soon receive an exposition in the highest court.

It follows, also, that the owners of lots on a street thus judicially condemned, have no other rights or privileges connected with the soil of the street, than the citizens or travelers generally, except in the cases in which rights exist of the same nature as between contiguous owners, and where ordinances give particular privileges.

2d. The next subject of consideration was the opera-

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tion of the act of 1691, and afterward of that of 1784, in relation to streets laid out after 1691, through lands included in the Dutch ground briefs.

It will be seen in the note* and diagram, that William street and Nassau street, from Maiden lane to about Ann street, and John street, and Fulton street, were laid out through the parcel of ground granted to Cornelius Van Tienhoven, by the Dutch governor in 1644. From Haberdrinck's will and the partition map of 1696, it appears, that the then owners "had laid out convenient streets through the ground." They acquired title in 1675. I think it probable that Nassau and William street were opened before 1696. William (called South) was opened in 1693, up to Maiden lane.† All these streets are mentioned in the deed and map of 1696. It will be considered, however, for the following argument, that they were then just laid out.

In this connection, Liberty street (then Crown street) may be referred to. On the 27th day of August, 1695, the Common Council directed a warrant to be issued to summon a jury to assess the compensation to be paid to Oloff Stephanus Van Cortlandt and others, for land to be taken to enlarge the New street, near Maiden lane, to the end that they who desire such street may satisfy the same.

John street, Fulton street, Nassau, and William, were adopted by the Common Council as public streets, as is proven by ordinances for paving, lighting, repairing, and regulating; in the case of John street, also, by applications to widen and alter in 1793 and in 1835. Crown street ran, to its junction with Maiden lane, through the land granted to Jan Jansen Damen, in 1644.

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* Appendix, Note 57.

† Deed from G. De Ross, &c., Ex'r of Rachel Van Tienhoven, July 29, 1693.

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I have previously submitted the following propositions:

That where the streets were laid out through any granted land during the prevalence of the Dutch government, the soil could be taken without compensation; and when taken, it vested absolutely and without condition in the government.

That the equitable modification of this rule, found, so early as 1656, in the Dutch ordinance, which required a compensation to be made, where gardens or inclosed ground were broken in upon, strengthened the case, and more effectually ratified the absolute vesting in the public power.

It was next submitted that this servitude attached to all lands granted by the Dutch government, the title to which is derived from such grants; that the Dutch ground-briefs are undeniable sources of titles;* that the stipulations of the surrender of 1664 secured them, with all their privileges, to the possessors; that the confirmations were only meant, and could only operate, to annul the clause of feudal allegiance; and that all who were thus secured in their titles remained subject to the servitudes or burthens which affected their lands before.

It was submitted, that the English government succeeded to this royalty or branch of the right of eminent domain; that it vested in the crown, and through the crown in the Duke of York. The right to open streets was to be exercised by the governors, unless restrained by law. Gov-

* I may add to the observations before made, the statement of Mr. Clayton, in the Pea Patch case (Wallace's Reports), that the grants issued by the officers appointed by the Dutch Director-General, in New York, were the source of the titles to considerable parcels of land in Delaware. Judge Cady, also, in the case of The People *vs.* Clark (10 Barbour, 741), says, that the sources of all the titles in the State are the Dutch or English patents. Every man who on the 20th day of April, 1777, owned an inch of land in this State, held it under a grant from the king, or under a Dutch grant.

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ernor Dongan transferred the exercise of the power to the Corporation, but with the restriction that property could not be taken but by consent, or by a law of the province. Speedily thereafter a law of the province was enacted, viz.: the statute of 1691, prescribing how land should be taken and condemned by process of law.

Now one of two conclusions is inevitable. The fee in the soil of streets run through such lands passed to the Corporation upon proceedings had under the statute of 1691, and of course of 1784; or the fee vested in the English government, and as a transmitted royalty came to the State.

And here a provision of the act of October 22, 1779,* is pertinent. It was declared that "the absolute property of all lands and hereditaments, and of all rents, *royalties*, franchises, prerogatives, privileges, escheats, forfeitures, debts, dues, *duties* and *services*, and all right and title to the same, which next and immediately before the 9th day of July, 1776, did vest in, or belong, or was or were due to the crown of Great Britain, be, and the same, and each and every of them, are hereby declared to be, and ever since the said 9th of July, 1776, to have been, and forever hereafter shall be, vested in the people of this State, in whom the sovereignty and seignory thereof are and were united and vested on and from the said 9th of July, 1776."

This shows the great importance of the act of March 7, 1793, vesting the whole title of the people of the State to lands left for streets in the city of New York, by any person or persons whomsoever, in the Corporation. A large number of streets had been opened between 1691 and that date, under the statutes; or had been opened by individual proprietors and ceded; or had been so opened, and expressly taken and adopted as public streets. If opened

* 1 Greenleaf, p. 31, §14.

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through places held under Dutch ground-briefs, some public authority took the land absolutely and as of right. If the Corporation did not take the fee under the act of 1691, the State did. And thus the statute of 1793 receives force, meaning and operation.

The phraseology used, "lands left for streets in the city," is, I submit, equivalent to *separated or taken out* for streets. This is the philological and rational sense.

The distinguished counsel for the plaintiffs, in the Broadway case, sought to restrict the objects of the statute to land in the streets, which had fallen to the State, by escheat or forfeiture.

As to the latter, the system of the State, which commenced with the act of attainder of the 22d of October, 1779,* was to sell all confiscated lands as speedily as possible, for which purpose Commissioners of Forfeiture were appointed. See also the preamble of the statute of 12th May, 1784. An examination of the records in the Register's office will show how extensively this was carried out by sales before 1793.

Now, upon the theory of the eminent counsel, the title to the street adjoining every parcel actually sold by the Commissioners of Forfeiture, had passed to the purchasers under the act, for all the estate and title of the attainted persons was to be sold. The statute of 1793 then, as to such portions of the streets, would have been not only unmeaning, but unlawful.

Nor can it be imagined, that the State meant to change such an operation as to future sales, and to give only the lot to the purchaser, and the adjoining street to the city. We may reasonably conclude that the Legislature had not this distinction in contemplation when passing the act of 1793.

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* 1 Greenleaf, 26, § 15.

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A similar course of remark will apply to the case of escheats suggested.

A more comprehensive view of the statute, I conceive, will be the true one. The charter of 1686 had transferred every estate or royalty of the crown to the Corporation, in all the streets then laid out.

The act of 1691, when considered under the light of these principles, has a new and important character. It is not the grant of an authority to open and regulate streets. I am still speaking as to lands within the ground-briefs. It is a restriction of the power of the Corporation conferred by the charter. It prescribes that houses shall not be taken but by consent, and directs that in all other cases, compensation must be made to the owner, unless he voluntarily cede the land.

If there was any *title*, *royalty*, *duty* or *service* vested in the crown of Great Britain, on the 9th of July, 1776, in any other streets, that title passed to the State, and from the State to the Corporation; and if any such title, franchise, duty or royalty had vested in the State after July, 1776, down to the passage of the act in any other streets, that also passed. The like reasoning covers the period from 1793 to 1813, when the vesting clause of the former act was renewed.

And as to the proposition now discussed, it has been, I trust, made out, that a royalty, duty, or service did vest in the sovereign power, as regarded all lands, the title to which was derived from a Dutch ground-brief; that such was an urban servitude by which the land could originally have been taken without compensation; and when taken, with or without it, vested absolutely in the State or its grantee. When taken upon compensation made, equity was united with law.

2. The next subject of consideration is the effect of the

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statutes of 1691 and of 1784, where streets have been opened under them, through lands, the title to which is directly derived from English patents.

It is in the first place to be noticed, that the statute expressly provides for taking "lots," and "ground," "and for assessing the damages and recompense to be awarded to the *owners* and others interested, according *to their estates and interests,* and for *their estates and interests.*"

The whole fee, therefore, could be paid for under the act. Compensation could be made for the whole; and then the land is condemned judicially to be converted by the Corporation for a public street.

Next, we must observe the very important difference in the language of this act, and the phraseology of the highway acts. In the first case, the ground, and the estate, right, title, and interest of the owners and others interested therein, is to be taken, valued, and paid for. In the latter, the *loss by reason of the laying out of the road* is to be estimated.

Again, the fact must be borne in mind, that with some qualifications, such as houses and inclosed lands, specially adopted, and, with some exceptions, by particular statutes,* the highways were run through lands, without making compensation at all. See the reference to the highway acts, *post*, title, "Roads," &c.

These observations will assist in determining the present question, viz.: whether a fee did not pass to the Corporation to streets opened under the act in question; or did not pass out of the owner and to the State, and from the State to the city by the statute of 1793.

* The act of October 14, 1732, as to Suffolk county, is an example. (1 S. & L., 203.) The Commissioners were to assess *the true value of the land taken*, and also the damage sustained by running the road. So the act as to Ulster county, when the land was improved or inclosed, contained a similar clause. (Ibid., p. 346.)

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1st. I conceive it to be the rule of the common law, that highways could be opened through the land of private owners, by authority of parliament, or of the crown, without making compensation. The theory of that law was, that the king was the ultimate source of title to all the lands of the kingdom. There was, I conceive, an implication in every grant of this servitude. This rule has been recognized in various States of the Union.

In Pennsylvania, it was so held in the case of McClennachan *vs.* Curwan (6 Binney, 509). The decision rests mainly, as to inclosed lands, upon the terms of Penn's conditions; but as to unimproved lands, upon the general law and subsequent statutes.

In South Carolina it was recognized in the case of Robert Lindsey and others, commissioners for making a new street (2 Bay, 38). The doctrine was distinctly held by two of the Judges. The citizen took his land subject to the burden. This was no violation of Magna Charta, but part of the *Lex Terræ*, before that was obtained. The argument of the Attorney-General is full of ability and learning. Burke, Justice, was of opinion that land might be taken for public use, but that compensation ought to be made. Justice Wake was of the same opinion, and gave his reasons at length.

But in Patrick *vs.* The Commissioners of Cross-roads, in Charleston (4 McCord, 541), the question was considered as settled, that the Legislature could pass an act to run a street through private lands without compensation.

Our highway acts, from 1691 to 1830, prove the same rule to have prevailed in New York. It is not necessary to consider the operation of the constitution of 1845 upon this subject.

2d. I apprehend that this rule is the foundation of the doctrine, that the fee in highways continues in the owner.

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The principal English cases sustaining this doctrine, and that of a reverter to the owner, rest upon or are consistent with the fact of the land having been taken by the sovereign power for public use, without payment. Devasten *vs.* Payne, 2 H. Y., Black, 527; Goodtitle *vs.* Alker, 1 Burrows, 133; 1 Wilson, 107; 6 East, 154. See also Viner, Tit. Chemin Private, vol. 2.

The law, says Lord Coke, presumes the way was first taken out of the lands of the party that hath other lands adjoining.

In the leading case of Jackson *vs.* Hathaway,* in our own courts, Justice Platt implies that this is the basis of the rule. He says: "When the sovereign imposes a public right of way upon the land of an individual, the title to the former owner is not extinguished, but is so qualified that it can only be enjoyed subject to the easement."

And this is distinctly recognized in the case in Georgia, from Charleton's reports, hereafter mentioned.

The leading cases in our own country are cited in the note.†

The great mass of these cases settle no more than this, that as between a grantor and grantee, the fee to the middle or the whole of the highway passes to the latter. They are all consistent with the doctrine of reverter where no compensation had been paid. I do not find a dictum that there is a reverter where compensation has been paid, except in the case in Mississippi; and there it is not stated whether it was the land that was paid for, or the easement only.

Beesen's case deserves careful examination. The road

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* 15 Johns. Rep., 446.

† Fairfield *vs.* Williams, 4 Mass., 427; Presly *vs.* Chancellor, 6 Ibid., 454; Webber *vs.* Eastern Railroad Co., 2 Metcalf, 151; Parker *vs.* Inhabitants of Framingham, 8 Metcalf, 262; Beesen's case, 3 Leigh, 821; 9 Hammond, 725; Union Burial Ground *vs.* Robinson, 5 Wharton, 18.

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in question had been taken under statutory provisions, compensation made, and the parcel judicially condemned. A flood carried it away, and proceedings were instituted to lay a new road over adjoining land of the same owner, without payment. It was held that the old road was at the risk of the public, and not of the owner, and a new one must be paid for.

In all cases in which the use of the soil—the easement only—has passed to the public, these cases determine the law in this manner. They do not settle when, and how, the land itself passes from the owner to the public. When this takes place, the fee does not reside in either party, and there can be no resumption of the road by either.

I now proceed to some important cases more distinctly pertinent to the present question.

Mayor of Savannah *vs.* S. B. Company (R. M. Charlton's Reports, 342). The propositions maintained by the learned Judge are these:

1. That by the law of England the fee in the soil of highway is in the adjoining owner. The public have an easement only.

2. That this is the general rule in South Carolina.

3. That when the public wants require the land itself, the fee passes on compensation being made.

4. The statute of Georgia contemplates payment only for the damage by reason of the servitude, not for the land.

5. That if, however, this rule was applicable at all to streets in a city, it did not apply in the present case; and the court proceed to show this by analyzing various statutes, proving that the fee in the street in question was in the corporate body, the city of Savannah.

United States *vs.* Harris (1 Sumner's Rep., 21). As this important case will be carefully examined by any one

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discussing the present question, I pass it over with two observations.

First, it will be difficult to find, in the long array of Justice Story's decisions, a case in which his mind seems to have fluctuated more, or eventually to have been more uncertain.

Next, he rests upon the language of a preamble to a statute as sufficient to show, that the Legislature meant only to have an easement valued, and to pass.

The case went to the Supreme Court of the United States (10 Peters, 26), where a similar line of argument was pursued. See the language, p. 55, as to the act of 1781.

It may justly be concluded from these cases, that the question is to be governed by the construction of particular statutes; Justice Story leaning to an interpretation against the vesting of a fee. The leaning of the court is undoubtedly changed, as the following cases will prove.

The city of Cincinnati *vs.* White (6 Peters, 431). The original owners had laid out a town, on a map, upon which a piece of ground, including the premises in question, was set apart as a common, for the use and benefit of the town forever.

The Judge on the trial charged the jury that it was competent for the original proprietors to reserve and dedicate any part of the town to public uses, without granting the same by writing or deed to any person; by which reservation and dedication, the right of use to such part is vested in the public for the purpose dedicated; but that it did not invest the public with the fee. It was therefore requisite that a use of twenty years should be established.

A new trial was ordered; and the opinion of the court carefully analyzed, settled—

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That the dedication in that manner operated to transfer the title out of the parties, although there was no one then capable of taking the fee. Next, that the dedication precluded the party from asserting any right over the land; at all events, so long as it remained in public use, although there never might be a person competent to take the fee.

That dedications for streets in a town or city might require a more enlarged right over the use of the land, to carry into effect the purposes intended, than a highway in the country.

So the Supreme Court in Barclay *vs.* Howell (6 Peters, 499), notice the distinction between roads run through lands in the country and streets in a city. And one point decided is, that if ground had been dedicated to a particular purpose, and the authorities applied it to a different purpose, it would not revert, although Chancery would interfere and prevent the wrongful appropriation.

Again, some cases in Illinois are very important. Board of Trustees, &c., *vs.* Haven (11 Illinois Rep., 554).

A statute provided that a proprietor of lands, about to lay them out in city lots, should make a plot in which the lots, streets, and alleys should be particularly designated, "and the land intended to be for streets, alleys, or other public uses in any town or city, shall be held in the corporate name thereof in trust for the uses and purposes set forth, and expressed or intended."

Under this act, the legal title to the land embraced in a street, was held to be vested in the corporation of the town or city, for the use and benefit of the public. The acknowledgment and record of the plot had the effect of an express grant.

The decision is the more pertinent, because of the change

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of phraseology in the different sections. I annex them in a note.*

In the 21st section it is expressly declared that the designation or the map of land given to individuals, religious society or corporation, shall be deemed to vest the fee of such parcels; while as to streets, the language is as before stated.

So in Hunter *vs.* Middleton (13 Illinois Rep., 50). The court say, that they adhere to the opinion expressed in the previous case; that the making and recording the plot vests the legal title in the Corporation. The title may perhaps revert upon a discontinuance of the streets, but until it does so, the fee is completely out of the power of

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* SEC. 17. Whenever any county commissioner, or other person or persons, wish to lay out a town in this State, or an addition or subdivision of out lots, said commissioners, or other person or persons, shall cause the same to be surveyed, and a plat or map thereof made by the County Surveyor, if there be any, of the county in which said town or addition is situated; but if there be no County Surveyor in the county, then, and in that case, by the County Surveyor of an adjacent county; which plat or map shall particularly describe and set forth all the streets, alleys, commons, or public grounds, and all in and out lots, or fractional, within, adjoining or adjacent to said town, giving the names, widths, corners, boundaries and extent of all such streets and alleys.

SEC. 21. The plat or map, when made out, certified, acknowledged, and recorded, as required by this division, and every donation or grant to the public, or any individual or individuals, religious society or societies, or to any corporation or bodies politic, marked or noted as such on said plat or map, shall be deemed in law and in equity a sufficient conveyance to vest the fee simple as all such parcel or parcels of land as are therein expressed, and shall be considered to all intents and purposes as a general warranty against such donor or donors, their heirs and representatives, to the said donee or donees, grantee or grantees, for his, her, or their use, for the uses and purposes therein named, expressed, or intended, and for no other use or purpose whatever. *And* the land intended to be for streets, alleys, ways, commons, or other public uses, in any town or city, or addition thereto, shall be held in the corporate name thereof, in trust to, and for the uses and purposes set forth and expressed or intended.—Revised Statutes of Illinois, 1845, p. 115–116.

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the owner. While it continues in the Corporation, he has no greater right in the streets than any other person. He cannot bring trespass for any injury to the soil or freehold. He has no title to be assailed; no possession to be invaded.

So in Bryant *vs.* McCaudles (7 Ham. Rep., 135), it was held, that lands might be dedicated to public uses without a donee to take the title. In Doe *vs.* Jones (11 Alabama, 63), the identical principles of the case in 6 Peters' Reports are applied and asserted. The case deserves minute examination.

There is another principle adopted into the later statutes, which deserves notice. I believe it is first found in our State enactments, in the statute of March 17, 1813.

If a new road is ordered to be laid out through the land of the same person who is the owner of the land over which an old one is run, and the latter is discontinued, the *value of the road so discontinued*, and the benefit to the person by reason of such discontinuance, are to be estimated, and to be deducted from the damages allowed him for opening the road. His right to take possession is thus, in fact, dependent upon his paying the value of the road.

Now, if the land has been originally taken for the old road, without being judicially condemned, or ceded upon compensation made, it is justice to restore it to the owner, but injustice to charge him with its value. If it was run through improved land, and has been paid for by the public, it is right that the owner should pay the public for it before resuming possession. But while the theory of such provisions admits inferentially an ownership of the fee, it is so qualified and restricted as that it is utterly unavailable without payment of the value; and at least it is a legislative recognition of the principle, that reverter should not nakedly exist where compensation has been made.

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All the streets laid out under the acts of 1691 and 1784 down to the new system of 1813, were laid out as follows:

By virtue of proceedings taken under one of those acts, either by a valuation agreed upon, or through the verdict of a jury and judgment of the court.

Or, by the adoption by the Corporation, of streets which the owners had before laid out as private ways through their lands, without a formal cession.

Or, by a formal and recorded cession of the land necessary for such streets.

In considering the subject, we are to recollect two fixed rules of law. In the first place, where the mode of opening a street cannot be traced, the legal assumption is, that it was opened according to the mode prescribed by law in force.* In the next place, the acceptance by the town or city is essential to convert a way laid out by private owners into a public street. What shall amount to such an acceptance has been the subject of much discussion and some doubt; but the better rule seems to be, that there must be a decisive act of the municipal power for the purpose, or acts which imply an acceptance, with a considerable lapse of time.†

The statute of 1801, before noticed, should be here adverted to, which prohibited the opening of streets without the consent of the Corporation, and authorized that body to close any they deemed required it.

With respect then to the first class of streets, viz.: those streets which opened through lands granted directly by the crown, and opened under the statute of 1691, or that of

* Colden *vs.* Thurber, 2 Johns. Rep., 424; Ward *vs.* Folley, 2 Southard, 482; Williams *vs.* Hering, 18 Pickering, 312.

† 5 Barn. & Ald., 450; 1 Law Reporter, 586, N; 20 Wendell, 96; 8 Grattan's Rep.; 2 Cushing, 562; 4 Harris' Rep, 79; 5 Cushing, 1; Mr. Webster's argument in vol. 6, p. 185 of his works.

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1784, the arguments before used appear to me to justify the result, that by force of those acts, the fee did pass away from the owner, and vested in the Corporation or in the State, and in the last case passed to the Corporation under the statute of 1793.

The argument may be thus condensed. The city pays by agreement, or through a verdict, the whole value of the whole estate and title to the strip taken. It would be error if less than such value was assessed. It cannot be imagined, that, in practice, less was given on a speculation of a reverter. It is important and expedient that a fee should vest in the Corporation. The language and intent of the act warrant the conclusion, that a fee does pass.

It is apparent that this reasoning applies as strongly to lands taken and valued by agreement under the act, as to those condemned by judicial process.* The act is the rule of proceeding, and determines the extent of title.

And so, where the Corporation adopted a street which had been laid out by the owners as a way, it is submitted that the same rule governs. The agreement is merely that the given line of street shall be taken, instead of a fresh one laid out. The compact is between the owner and the Corporation; and the strip could be taken and held by the latter only under the charter, or under a statute then in force.

It may be, I think, concluded, that in all these cases, the naked fee did pass out of the original owner. Then, upon a discontinuance, the clause of the constitution referred to in the John street case, does not apply. It is not *his* property which is taken for public use; and the act of 1818 may be vindicated. (See John street case, 19 Wendell, 660.)

* In September, 1694, a committee was appointed to lay out streets, and to agree with the owners for compensation for the land to be taken.

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If we can get clear of this technicality, every point of equity is clearly against the adjoining owner.

What are the equitable interests of the owner connected with the land in the street? He has been paid its full value, or has had the opportunity of demanding and receiving its full value. He has then acquired the right of having it retained as a public street; but that right is clearly subservient to public necessity or convenience; and the proper authority may close the street, making due compensation for any damage sustained.

And so as to the Corporation, while the legal estate is vested in them, it is subject to the public easement—is held in trust to be used as a street. When the strip is closed, this trust is discharged, and the land is taken in absolute ownership. But as the property then becomes available, the Corporation is charged with its actual value, which goes to defray the damages and costs of closing.

And as to the adjacent owners, who are supposed to have paid for the original opening of the street, perfect justice is also done. We must notice, that under both the statutes of 1691 and of 1784, there was no such principle as assessing damages on adjacent owners. The public funds bore the burthen. But still, in any case, the adjacent owners receive an allowance for any injury resulting to them by the discontinuance of the street.

The cases of John street and the Burnt District will exemplify the working of the system under the act of 1818, and illustrate the principles sought to be sustained.

John street was opened in or before the year 1696, the date of the partition of the Shoemaker's Field; and it was run through land granted by Kieft to Damen, in 1644. I pass, however, over this point.

In the year 1835, a part of John street, on the south side, running from Broadway, was closed, and it was

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widened and straightened by taking a portion of ground on the north side.

The commissioners valued the strip at its full value, and charged it to the Corporation—the fee in absolute ownership, under the act of 1818, going to them. What was held in trust, subject to a public easement, was thenceforth to be held discharged of it. But the owner on the south side, whose land was before a corner, was now made an inner owner. The damage resulting from this was ascertained and allowed him. And as he received some benefit from the increased width of the street, that was charged him. So, also, as the Corporation took the strip in the street at its positive value, without regard to the new improvement, they were charged something for the enhanced value by reason of such improvement.

When the report was sent back by the Supreme Court, the commissioners struck out the charge to the Corporation, and the allowance to the owner by reason of the conversion into an inner lot; and they reported "that Baltus Moore was entitled to the strip, subject to a right of way in the public, and they assessed the benefit and advantage to the said Moore, in consequence of his becoming entitled to the use and possession of such strip, discharged of the easement and public right of way, at $15,000." This report was confirmed by the Supreme Court, September 9th, 1839. The sum was the exact sum before charged to the Corporation as the value of the land. (See Bolton *vs.* Draper, 5 Duer, p. 151.)

Since the publication of the first edition of this work, several cases have been decided in the courts upon the topics discussed in this section. No final decision upon the great question as to the title in the streets, and the right of reverter, has yet been made by our highest Court, and I have left the preceding elaborate statement of my views unmodified and in full.

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In Barton *vs.* Draper (5 Duer's Reports, 130), Mr. Justice Hoffman, expressing his own opinion merely, said: "I consider that in relation to the ancient public streets of the city of New York, it is either matter of fact, or matter of legal presumption, that the fee is in the Corporation. By the term ancient, I mean the streets not laid out under the the act of 1807; and by the term public, the streets originally laid out by the City Government under an existing law, or, when laid out by private owners, adopted and taken by the Corporation as public streets."

In that case I examined the subject at much length in support of the views I have stated in this Treatise. One point seems to me to deserve great consideration in regard to the John street case. The course of the Commissioners and Supreme Court is before stated. (*Ante*, p. 345.) Baltus Moore was obliged to pay $15,000, the whole value of the whole title to the strip of ground, the mere barren fee of which was held to be in him. Now, upon the simple idea and doctrine of a reverter, it is difficult to understand why he should pay anything; and it is not easy to see how, if he has what is valueless, and acquires what is valuable only by payment in full, his property is taken away contrary to the Constitution.

In Williams *vs.* The Central Railroad Company (16 N. Y. Rep., 97), Mr. Justice Selden, delivering the opinion of the Court, commented upon Drake *vs.* The Hudson River Railroad Company, and the opinion of Chief Justice Jones and Justice Edwards, as to the title to the soil in the street, and observed: "No case is likely to arise in the city of New York which would be entitled to any weight in the decision of this question, for the reason that it is claimed, and apparently with much justice, that, as to a large portion of the streets in that city, the fee of the land, and not a mere easement, is vested in the Corpora-

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tion. Judge Hoffman, in his recent work on the corporate powers of the city, after arguing, with much clearness and force, in favor of the position, says: "In every street then opened under the provisions of the acts of 1807 and 1813, the fee of the soil is vested in the Corporation. It is divested from the original owners."

He quotes several cases, particularly The Ohio and Lexington Railroad Company *vs.* Applegate (8 Dana's Rep., 289), and says: "These cases, and others of the same class, may be considered as settling that a railroad, in a populous town, is not a nuisance *per se*, and that when the railroad company has acquired the title to the land upon which its road is located, such company, being in the exercise of a lawful right, is not liable, unless guilty of some misconduct or negligence, for any consequential damages which may arise to others from the operation and use of the road."

The point decided in the case was, that when, by a dedication of land to the public, nothing was acquired by the public but the easement, or right to use the premises as a highway, a railroad company could not take the street, and occupy it for the road, without the owners' consent, or an appraisal of damages.

In Bissell *vs.* The New York Central Railroad Company (Court of Appeals, October, 1861), it was held, that as between grantor and grantee simply, the conveyance of a lot bounded upon a street in a city, carries the land to the centre of the street. No distinction exists, in this respect, between the streets of a city and country highways. The grantor could not bring ejectment.

Almost every view which can be taken of the title of the Corporation to the streets, has been taken by different judges, in the cases respecting railroads in the city. The

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following is an analysis and history of the statutes and decisions:

First—THE STATUTES.

A review of the statutes would be defective, without adverting to some special acts, indicating the ground which the Legislature has assumed as to the rights of the Corporation.

Thus, the charter of the Harlem Railroad Company of April 25, 1831 (Laws, 1831, p. 323), declared in the tenth section, that nothing therein should be construed to authorize the company to construct the road along any of the streets or avenues designated on the map, without the consent of the Mayor, Aldermen, &c., "who are hereby authorized to grant permission to construct it across or along such streets or avenues, or to prohibit the same."

The charter of the Hudson River Railroad required the consent of the Corporation of the city. They could locate the road through any streets within the limits mentioned, provided the assent of the Corporation was first had. (See Drake *vs.* The Hudson River Railroad Company, 7 Barbour, 508, where it was held that such assent had been given.)

On the 2d of April, 1850, a general act was passed, "to authorize the formation of railroad corporations, and to regulate the same." The fifth subdivision of section twenty-eight has a clause, "that nothing in the act contained should be construed to authorize the construction of any railroad not already located in, upon, or across any streets in any city, without the assent of the Corporation of such city."

The next statute which bears upon the present subject is that of the 4th of April, 1854, (Sess. Laws, ch. 140). The first section provides, that the Common Councils of the several cities of the State shall not hereafter permit to

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be constructed, in either of the streets or avenues of the said cities, a railroad for the transportation of passengers, which commences and ends in said city, without the consent thereto of a majority in interest of the owners of property upon the streets, in which such railroad is to be constructed, being first had and obtained. For the purpose of determining what constitutes such majority in interest, reference shall be had to the assessed value of the whole property located upon such street or avenue.

By the second section, it was declared lawful, "after such consent had been obtained, for the Common Council of the city in which the railroad was to be located, to grant authority to construct the same, on such terms, conditions, and stipulations in relation thereto, as such Common Council might prescribe; but no such grants should be made, except to such person or persons as should give adequate security to comply, in all respects, with the conditions and stipulations so to be prescribed by such Common Council, and convey passengers upon such railroad at the lowest rate of fare."

"Nor shall such grants be made until public notices of the intention to make the same, and of the terms, conditions, and stipulations upon which it will be given, and inviting proposals therefor, at a specified time and place, shall be published, under the direction of the Common Council, in one or more of the principal newspapers published in the city in which such railroad is proposed to be authorized and constructed."

The third section provided, that the act should not be held to prevent the construction, extension, or use of any railroad in any of the cities of the State, which had already been constructed in part; but the parties and companies by whom such roads had been in part constructed, and their assigns, were authorized to construct,

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complete, extend, and use such roads in and through the streets and avenues designated in the respective grants, licenses, resolutions, or contracts under which the same have been so in part constructed, and to that end the grants, licenses, and resolutions aforesaid were confirmed.

A special act was passed on the 14th of April, 1860 (Sess. Laws, 1860, ch. 411). It provided, that the grant or permission given, or intended to be given, by the Common Council of the city of New York, by resolution passed in the year 1853, to W. Bradford and others, to lay, construct, and operate a railroad through the Ninth avenue, Gansevoort street, Washington street, Battery place, and Greenwich street, &c., and the powers, rights, and privileges therein granted, be confirmed and made valid; and the parties, their assigns, &c., were empowered to lay, construct, and operate a railroad over and upon such avenues, streets, &c.

The third section contains a provision, that in case any other person than the Mayor, Aldermen, and Commonalty of the city of New York shall own any private right or interest in any of the said streets or avenues over which such railroad is authorized to be made, the associates might acquire the right thereto by agreement, or by pursuing the provisions of the 14th, 15th, 16th, 17th, 18th, 19th, 20th, and 21st sections of the act "to authorize the formation of railroad corporations, and to regulate the same," passed April 2, 1850, with certain exceptions of inapplicable clauses.

Another act was passed the 17th of April, 1860 (Sess. Laws, 1860, ch. 513), entitled, "An act to authorize the construction of a railroad in the Seventh avenue, and in certain other streets and avenues of the city of New York."

The first section enacts, that the persons named are em-

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powered to lay and operate a railroad, commencing on the Seventh avenue, at the southern extremity of the Central Park, and running through the streets named, down to and including part of Barclay street. It was to be subject to such reasonable regulations as the Common Council may prescribe.

The 3d section provides, that should any real estate or interest therein be required for the purpose of constructing such railroad, for which the persons above named, or their assigns, shall be unable to agree with the private owner or owners, for the use or purchase thereof, they may acquire the right to use, or title to the same, in the manner specified in the general railroad act of 1850.

"But, in all cases, the use of said streets and avenues, for the purposes of the said railroad, as herein authorized, shall be considered a public use, consistent with the uses for which the Mayor, Aldermen, and Commonalty of said city hold said streets and avenues."

By section 4, the Mayor, Common Council, and the several officers of the Corporation of the said city of New York, and the said Corporation, are prohibited "from giving any assent to, or allowing any company claiming to derive authority under the act entitled 'An act to authorize the formation of Railroad Corporations, and to regulate the same,' passed April second, eighteen hundred and fifty, or act amendatory thereof, or in addition thereto, to construct any railroad in or upon any or either of the said streets or avenues, and from doing any other act to hinder, delay, or obstruct the construction or operation of said railroad, as herein authorized. And it is hereby made the duty of the said Mayor, Common Council, and other officers to do such acts, within their respective departments, as may be needful to promote the construction and protect the operation of said railroad, as provided in this

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law. Any act or thing done in violation hereof, shall be inoperative and void."

"All actions relating to, affecting, or arising under this act, or the authority herein given, shall be commenced in the Supreme Court of the first judicial district. Nothing in this section contained shall be deemed or held to impair the rights of any railroad now in operation in said city."

By section 5, all provisions of law inconsistent with the act were repealed.

Various statutes for other railroads were passed at the same session. One for a railroad in avenue D, West Broadway, &c. (ch. 512); another in Fourteenth street and other streets, (ch. 514); and another in Tenth avenue and certain streets, (ch. 515).

The provisons, except as to the route and parties, are precisely the same as in the act above stated.

DECISIONS.

Drake *vs.* The Hudson River Railroad Co. (7 Barbour, 508). The Hudson River Railroad Company was authorized to construct a railway on any streets or avenues west of a particular line, with the consent of the Corporation. The consent to the road and the location was obtained. The Supreme Court refused to restrain its construction, on the application of persons owning property on the streets, alleging that the road was unauthorized by law and a nuisance, and that their property would be injured thereby. The lands in the streets mentioned in the case had belonged to Trinity Church, and had been ceded by that corporation to the Corporation of New York, to be held for public uses, as the other public streets were held, and the streets had been opened under the statute by commissioners. The fee in the street, or any proprietary

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right, could not pass by a subsequent conveyance to an individual.

The presiding justice observed, that it was necessary or highly expedient that the legal title to the land or soil should reside in the City Corporation; and hitherto it has been the received opinion that the same was vested in them. Under the colonial government, and during its continnance, the lands occupied by the streets previously laid out, were understood to be vested in the crown, subject to the use of them as streets; and the State succeeding to the crown in the ownership thereof, the same, and the right and title therein of the people, were, by an act of the Legislature, vested in the Corporation of the city.

The presiding justice and Mr. Justice Edwards held, that a railroad in a city was not *per se* a nuisance; and that the Corporation had the power and right to use the streets for such a purpose. Thus, Justice Edwards states positively the points intended to be, and actually decided. (15 Barbour, 207.)

In the case of Hope *vs.* The Sixth avenue company (Special Term, Superior Court, May, 1851), the following decision was made, which I state as my present view of the law as it then stood, and shall show how far it is sustained by subsequent decisions. and what appear to modify it.

Prior to the late decisions in this Court, and in the Supreme Court, upon the subject, and after the case of Drake *vs.* The Hudson River Railroad, I should have considered the following propositions as incontestible:

1st. That the establishment of railroads in the city of New York by the authority having title in the streets, and to the control of them, was an incident to that title and authority, and not in itself an invalid use of the public streets.

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2d. That the body vested with such title and control was the Common Council. In my judgment, this power was in the Common Council without the aid of any statute of the Legislature, although there might be a power to restrict it by express enactment. When, and to what extent, the Legislature could restrict it, was an open question. But the great principle was, that the power existed without the legislative grant, and that it must be shown to be abridged; and, at any rate, that the Legislature never could empower others to construct railroads without the approbation of the Corporation.

3d. That the Corporation of New York held the naked fee of the streets of the city, but held the same as trustees, and were trustees upon the tenure of holding and keeping them open as public streets; and that the parties for whom they were trustees were, first and principally, the citizens and inhabitants, and next, travelers generally.

4th. In executing this trust, the Corporation was amenable, like all other trustees, for the faithful, legal, and honest discharge of its duties; and corruption, fraud, or violation of law would not only render its contracts and acts invalid, but would justify the interference of a Court by provisional remedies to prevent their consummation.

5th. That the right to apply for such relief, as the law stood upon several decisions of the Supreme Court, was vested in any persons injured individually or as inhabitants of the city and tax-payers. This rule had been disputed, perhaps overruled, in our Court, and the individuals sustaining injury must unite the Attorney-General with them whenever the question is either one of public nuisance, or regards the violation of its charter by an incorporated company, or perhaps where corporate property is sought to be applied illegally to any other than the public pur-

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poses, to which it has been by law devoted. (12 Legal Observer.)*

But every lawyer will understand the pervading influence, upon every point which may arise, of the solution of the question, whether the Corporation of New York has an original chartered right to establish railroads in the streets, or derives that right from acts of the Legislature. In the former case, they who contest its power, must show a restriction; in the latter, the Corporation must show when, and to what extent, it has been vested.

In my judgment, the Legislature has no more power to establish a railroad in a street in the city of New York, without the assent of the Corporation, than to run it through the house of an individual owner without his consent. They may do it in the one case as in the other, upon the ground of public necessity, and upon making proper compensation. But they must, in their legislative capacity, declare the public exigency which demands the appropriation, and must provide the mode of compensation for a surrender of a right in property. Otherwise, they invade the right of the Corporation of New York in the streets as much as if they enacted that my house should be torn down without public necessity and adequate remuneration.

But again, I hold that the Corporation of the city possess the power of establishing railroads, and that it is incumbent upon those contesting its exercise in any case, to show that they have violated their trust or plainly violated a statute of the State which it was competent to pass, or have broken in upon a fundamental rule of law controlling the power of the Corporation.

It is now my duty to ascertain how far these proposi-

* It is now settled that it cannot be had by tax-payers and corporators merely. See *post*, chapter iv., § 2, title, "The Corporation as Trustees."

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tions have been overthrown or modified by the decisions referred to.

1st. I do not find it yet decided by either the Court of Appeals or the General Term of this Court, that the Corporation of New York cannot make any grant to others of the right of constructing a railroad in the streets of the city, without a specific act of the Legislature, whatever may be the terms or conditions of the permission. I do not mean to say but that this may be logically reasoned out from some propositions of some learned judges, but I do not find that it has been judicially pronounced, or that it necessarily results from anything which has been judicially decided.

On the contrary, we find it declared by Justice Edwards, in his able opinion, after a careful review of Drake *vs.* The Hudson River Railroad Company, and the other authorities, that this power does vest in the Corporation. And we find this sanctioned by Justice Strong, and by Justice Morris. (15 Barbour.)

2d. Next, the question as to where the fee of the streets resides, does not arise in this case; for the complaint states, that the title to the lands in the streets named, was vested in the Mayor, Aldermen, &c., in trust, that the same should be appropriated, and kept open forever, as public streets, for the free and common use of the citizens. I need not, therefore, attempt to support my individual views upon the subject.

3d. The decisions in the Broadway Railroad case depend upon two great principles.

In the first place, there was a violation of the trust reposed in the Corporation. They were acting in a reckless or profligate disregard of the interests and rights of those of whom they were the agents. In the next place, the grant was not a mere license revocable at the will of the

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Corporation, or upon prescribed and reasonable terms. It was a contract which must remain perpetually in force, unless the company broke the conditions. The Corporation could not bind themselves by an inviolable contract, the effect of which was to surrender, practically and perpetually, the management and regulation of the streets. It was a trust which they could not part with.

With this view, Justice Strong, Justice Harris, Justice Duer, and the General Term of this Court, consisting of Justices Oakley, Bosworth, and Slosson, have concurred. These points are settled by authority, and rest upon incontestible principles.

But if the license to use the streets for a railroad is not an irrevocable contract—if it is not an attempt to divest the Corporation of an inalienable control, and to confer vested rights upon others, which may not be abridged—then I see no necessity for an enabling statute of the Legislature, but I find the power of the Corporation is in itself sufficient.

In the case before me, the Common Council have reserved "the power to cause the road, or any part thereof, to be taken up at any time they shall see fit;" have provided that the road shall be transferred to them whenever they demand it, upon payment of the cost, and ten per cent. added; and that the parties, on being required at any time by the Corporation, and to such extent as the Common Council shall determine, shall take up, at their own expense, said rails, or such part thereof as they shall be required; and, upon failure so to do, the same may be done, at their expense, by the Street Commissioner.

In words, then, the power to purchase for the use of the city, and thus to extinguish a monopoly in others, the power to remove such portions as may be found injurious to public convenience, and the absolute power to annul

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the license, is reserved. When the companies accepted the permission thus conferred, they were bound to know that the law was, as it is now pronounced to be, that the corporation could not give them an irrevocable right; and hence, that the power to take up the rails was not an unmeaning or contradictory reservation, but a declaration of the legal rights and position of the parties.

I take, then, the first four propositions at the close of the opinion delivered by Justice Bosworth, at the General Term, in Davis *vs.* Sharp and others, as concentrating the conclusions to which so many judges have arrived. Now, I do not understand those propositions as involving more than this; that the grant in question was such a grant of a franchise as the Corporation had no power to make, because, by its legal import, it might be perpetual; because it was a contract which restricted the Corporation in the future exercise of its power over the streets, and because it conferred upon the grantees exclusive privileges to a partial use of Broadway, which might be of perpetual duration.

If the observations before made possess the weight I suppose they have, then the grant to the Sixth Avenue Railroad is not liable to any of these objections.

Next: The next sources of restriction upon the powers of the Corporation to which I adverted, were acts of the Legislature, apparently inconsistent with the exercise of that power in authorizing a railroad. I do not know of any such acts, except those which were referred to in the Broadway Railroad case.

1. The statute of April 9, 1813, section 198 (2 R. S., 424), regulates the meeting of carriages in the streets, and directs that they are to be driven to the right, respectively, under a penalty.

It was considered that as the cars could not be run so as

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to comply with this provision, the statute would in effect be abrogated by a mere municipal act. (Justice Bosworth's opinion at General Term.)

The act of 1850 remedies this objection. I understand the statute to give the authority or assent of the State to the construction of railroads in cities, with the concurrence of their corporations. See Subd. 5 of § 28, § 39, § 40. Also the act of 29th March, 1853, Sess. Laws, p. 86. Such authorization amounts to the implied repeal of any legislative acts of police regulation which appear to be repugnant to the establishment or use of the road.

2. The statute authorizing the Common Council to pass by-laws, from time to time, for regulating hackney-coaches or carriages, and their rates of fare or carriage, was deemed violated in the Broadway Railroad case. (Justice Harris, 9 Leg. Obs., 188.) The Corporation had empowered the associates to receive from any person they might carry five cents. This was deemed an unlawful restriction of their authority, to regulate the rate of fare from time to time.

But the general power of passing all regulations deemed necessary for the management of the road, was expressly reserved.

And by the resolution approved of July, 1851, the rate of passage for the entire length of the road was not to exceed a greater sum than five cents. I think that there was no violation here of the act of 1813.

The difficulty adverted to by the learned Judge, that the right of the Mayor to license was infringed, does not arise here. One clause of the resolution is, that each passenger car to be used on such road shall be annually licensed by the Mayor, and there shall be paid, annually, such sum for a license as the Common Council shall hereafter determine.

3. It was again objected, that by the 9th section of the

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amended charter of 1849 (Laws, p. 280), the executive power of the Corporation was vested in the Mayor and heads of departments, and such other officers as might be created by law; and that the Common Council shall not perform any executive duties except such as might be specially imposed by the terms of the statute. That the 14th section enacted that there should be a department called the Department of Streets and Lamps, which should have cognizance of cleaning the public streets, and collecting the revenue from a sale of the manure. And that by the tenth article of the grant in question, the grantees were to sweep and clean so much of Broadway as lay south of Fourteenth street, &c. This was inconsistent with the provision of the amended charter referred to.

There is no such provision in the resolutions now in question. The statute in this particular is left in force.

The case of Wetmore *vs.* Story and others, in various forms, has presented most of the questions on this subject. The action was commenced in December, 1853.

The plaintiffs sued as citizens of the State, residents and inhabitants of the city of New York, corporators of such city, owners of real estate on Greenwich and Washington streets, tax-payers, and on behalf of themselves, and of all other citizens, tax-payers, and inhabitants of the city, and owners of property upon Greenwich and Washington streets.

They alleged such streets to be public thoroughfares, the fee of which was in the owners of the land fronting on the respective sides thereof, subject only to the easement or right of way.

The ownership of certain lots fronting on such streets was then set forth to be in the plaintiffs, respectively.

That the city of New York was a municipal corporation, under the name of the Mayor, Aldermen, and Commonalty

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of the city of New York, with rights, privileges and jurisdiction limited and defined by its charter and amendments thereto; that its property was held in trust, and all sales and dispositions thereof were required by law to be made to the highest bidder, with adequate security, at public auction. That the Corporation had no power to give or grant to any one a particular or exclusive privilege to use such street, nor to authorize any obstruction therein, and had no property, or right of property, in the lands over which Greenwich and Washington streets pass. They were commissioners of highways, and their only power was to make repairs, and keep them in good order, for the use of citizens and travelers.

There were then allegations as to the character of the business conducted in those streets.

Resolutions of the two Boards were then set forth, passed in December, 1853, authorizing the construction of a railroad from Fifty-first street, through the Ninth avenue and other streets, carrying it through those parts of Greenwich and Washington streets opposite to the lots owned by the plaintiffs.

Various grounds were then stated, upon which the grant was to be deemed void. The material ones passed upon by the Court are hereafter noticed. An injunction was sought against the grantees, forbidding their laying down the rails and constructing other works, &c.

Mr. Justice Cowles, before whom the action was tried, held, that a railroad in a city was not *per se* a nuisance. That the power of the Corporation to license the establishment of a railroad in the city, subject now to the restrictions of the act of April, 1854, was clear. That the grant was free from the objections in the Broadway Railroad case, because it was a mere license, revocable at the will of the Common Council. The propriety of allowing the

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streets to be used in this manner was a subject upon which the Common Council had full legislative authority to act. Such act was not subject to revision by a Court. He overruled also the objection, that the resolution had been passed in one year by one branch of the Common Council, and concurred in by the other branch in the subsequent year.

The complaint was dismissed.

On an appeal to the General Term, before Justices S. B. Strong, Roosevelt, and Clerke, the two latter Justices concurred in these propositions (22 Barbour, 414):

That the resolution was not a resolution of the Common Council. The Common Council of 1852 was not the Common Council of 1853. The resolution passed by the one Board in the former year, could not be acted upon by the other Board in the subsequent year. The concurrence of both existing Boards elected for the year, was necessary, to a valid ordinance. The road was to be constructed, therefore, without lawful authority.

Having no warrant for its commencement, and none for its continuance, the road, under the evidence, was a public nuisance, and a public nuisance of which the plaintiffs had a right to complain, as specially injurious to them.

An injunction could be granted, in such a case, to the parties specially aggrieved.

Mr. Justice Strong concurs in these propositions. He discusses the case in a very elaborate opinion, and makes some important observations, which are hereafter noticed.

A perpetual injunction was awarded. The judgment was reversed in the Court of Appeals on a technical point. None of the important questions were passed upon. A new trial took place before Mr. Justice Davies, in May, 1859.

Upon the new trial, Judge Davies granted a perpetual

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injunction. He followed the law as declared by the General Term. He found, as a fact, that the plaintiffs were not the owners of the fee of the land in the street, opposite their respective lots.

After his decision, the act of the 14th of April, 1860, before cited, was passed, confirming the resolution of the Common Council of 1853.

A motion was made in November, 1860, to vacate the injunction. Mr. Justice Hogeboom considered all the objections of the General Term to have been obviated by the statute of 1860; that the motion was proper to raise the questions, but that Wetmore, one of the plaintiffs, had a fee in that part of Washington street opposite his lot, and that section three of the act referred to entitled him to compensation.

After the act of 1860, a complaint was filed, by the Attorney-General in the name of the People and by one Earl, *vs.* Bartholomew, the latter claiming title to a lot on Greenwich street. A motion for an injunction as to such part was granted by Justice Hogeboom. His reasons were the same as upon his denial of the motion to vacate the injunction in the other suit.

Appeals from the judgment, and from these several orders, were argued at the General Term, in June, 1861, before Judges Welles, Clerke, and Leonard. The case is not yet decided.*

The absolute decision in Davis *vs.* The Mayor of New York, &c. (4 Kernan, 506), was, that the resolution of the Common Council, as to the Broadway railroad, was a surrender of the whole power and duty of the Common Council in relation to the public streets, and was not a revocable license. Hence it was void.

One of the acts of 1860, wholly negativing the power of

* January, 1862.

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the Corporation in the matter, and holding its consent to be needless, was considered in the case of the People, the Trustees of the Sailors' Snug Harbor, and others, *vs.* John Kerr and others, 1860. The action was for a perpetual injunction from constructing a railroad, known as "The Broadway Parallel."

The plaintiffs other than the People alleged, that they were owners of land along the line of some of the streets, and owners of the fee of the streets in front of their lands; that the laying of a railroad track would be specially injurious to them; that the privilege was worth more than a million of dollars, and would, if sold, produce that sum; that the grantees were laying down the track without making compensation for the use of the streets, either to the plaintiffs, whose lands in the streets were to be used, or to the city corporation, in violation of the constitution.

Grants of cession were put in evidence for the land in the streets, conveying the fee to the Corporation, (except the lots held by Varian), to be held in trust, for the use of the public.

The land opposite Varian's lot was shown to have been used for a highway upwards of one hundred and fifty years, or to have been acquired under the act of 1813.

Mr. Justice Leonard held:

1st. That the claim of the plaintiffs, based on the fact of their being tax-payers, or members of the Corporation, gave them no right to the interposition of the Court. No private person could become the champion of the community (Doolittle *vs.* The Board of Supervisors, 18 N. Y. Rep., 162).

2d. The claim to the ownership in fee was unfounded. After a cession or release of lands in a street to the public use, the former owner is not entitled to claim any other interest in the streets than the public in general enjoy. As

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to Varian's lot, the street opposite was acquired under the act of 1813, upon making full compensation. He considered the fee of the streets to be in the Corporation.

3d. If the fee in the streets, or any of them, was not in the Corporation; if there was some remote right of reversion, the possibility of a reverter was too remote and contingent to be of any appreciable value.

The defendants were correct in the position, that the title to the streets over which the proposed railroad was to be carried, vested in the Corporation.

Since the resolutions in Bloodgood *vs.* The Mohawk Company (18 Wendell, 71), a railroad cannot be deemed a public nuisance. Private property could be taken therefor, when authorized by the Legislature.

If the defendants were lawfully authorized to construct the railroad, it could not be, when constructed, a public nuisance.

The learned Judge then examines the act, especially the clause rendering it the duty of the Common Council and its officers to do such acts as may be needful in its construction; and declaring that if they do anything to obstruct the construction, the act shall be void.

The Corporation had a right to compensation for the taking of the soil in the streets, the fee of which was in them. The act, by not providing for such compensation, was illegal and void. For this reason, its construction would be unauthorized, and a public wrong. The plaintiffs, as owners of abutting lots, can avail themselves of this.

The injunction was continued until the hearing.

The illegal and unconstitutional character of these acts appears to me to flow, from their being infractions of the corporate rights vested in the city by the State, and a violation of the obligation of a contract. The fee, the absolute right, the franchise, the use, are vested in the

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Corporation. That it is for certain trusts is of no moment upon the question, to constitute any distinction. It is a right from which pecuniary advantage does as clearly and in fact result, as from a ferry franchise. The license as to the use of vaults is a signal instance of this. The right to impose a license fee has never been denied. The license fees of omnibuses and hacks may as justly be referred to this property and dominion of the streets, as to any other source of authority. I can never believe that the Legislature may, of its mere will, against or without the sanction of the Corporation, establish a railroad in the city. In my judgment, nothing but a decision of the Court of Appeals can sanction such a dogma, and convert what seems to me manifest usurpation into a lawful legislative act.

In relation to the act concerning the Harlem Railroad, Mr. Justice Hilton, in the case of The New York and Harlem Railroad Company *vs.* The Mayor, Aldermen, and Commonalty (Common Pleas, Special Term, 1858), considers that the Corporation could not have granted the permission without the legislative sanction and authority.

But it seems to me, that the lowest view in which it is possible to consider the power of the Corporation, makes their assent indispensable, because of their title to, and control over, the streets. If an act of the Legislature is necessary to warrant the construction of a railroad, there is a co-ordinate power in the Corporation to deny, and of course, to permit it, and the right to permit results from its power, antecedent of any legislative act. The Legislature, in this view, legalizes the use, prevents the possibility of the road being deemed a nuisance; but the assent of those entitled to the dominion of the streets is yet essential. The great objection to Mr. Justice Hilton's proposition seems to be, that if the legislative authority

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is requisite to enable the Corporation to assent, it is competent to forbid the Corporation to consent; leading, then, logically to the result, that the Legislature can establish a railroad without the assent and in defiance of the Corporation. This is a proposition which, in my opinion, cannot be sustained.

In the opinion of Mr. Justice Hogeboom, he considered that a grant of the Corporation of a lot bounding upon a street was like the conveyance of an individual, and passed the title to the centre of the street, if a similar grant by the latter would have done so. Mr. Justice Strong, in Wetmore *vs.* Story (22 Barbour, 487), takes a different view.

The question, whether the right to the middle of a highway passes, is a question of interest. Certain words are held ordinarily to imply the intent to pass it; others to disprove it.* But the Corporation can dispose of a lot bounding on a street, as fully as an individual, freely pursuing the legal methods of alienation. But they cannot dispose in proprietorship of the soil in the street. They hold it in trust for specific purposes, of a general public use. The whole character of the tenure is powerful to disprove the possibility of such an intent, and the trusts on which they hold the street would be defeated or embarrassed if they could dispose of it.

The review of these cases and statutes shows that some few points only are decisively settled.

1. It is settled, that if the Corporation can, by its own power, authorize a railroad in a street, it cannot be a public nuisance. When such a construction is sanctioned by a power competent for that purpose, the question of nuisance is precluded. (Davis *vs.* The Mayor, &c., 4 Kernan, 506.)

* Kent's Comm., Vol. 3, p. 434; 20 Wendell, 98; 11 Price, 736-739; 5 Conn. Rep., 310; 1 Conn. Rep., 127.

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2. I think that it may be deemed the law, that the fee of all the public streets rests in the Corporation.

3. What is the law on the first important point—viz.: whether, in the absence of any legislative restriction, the Corporation, by its own power, can license the use of the streets for a railroad, subject to the great doctrine of the Broadway case, of a power of revocation?

Chief Justice Jones and Mr. Justice Edwards expressly decided that the Corporation had the power. (See 15 Barbour, 207.) Justice S. B. Strong and Justice Morris hold the same doctrine (Ibid.) I presume to say, that there is not a General Term decision to be found against it.

Mr. Justice Denio, in Davis *vs.* The Mayor, &c. (4 Kernan, 506), denies this right. He examines the question very fully.

On the contrary, Mr. Justice Comstock says: "I am confidently of opinion, that the municipal government of New York may construct, or, by mere license, authorize others to construct, an iron track in Broadway, adapted to vehicles of the kind used on railroads, and that licenses may be granted to the owners of such vehicles, as other carriages are now licensed."

Wright, Justice, and, as seems inevitable, T. A. Johnson, Justice, concurred in this view.

4. Supposing the power to exist without legislative sanction, the next inquiry is—may the Legislature restrict the Corporation in its exercise, impose conditions or limitations upon its power, and to what extent? The act of 1854, requiring the consent of a majority of adjacent owners to be given, is an example of such a restriction.

But if the theory of the statutes of 1860 is correct, any inquiry under this head is needless. These acts claim for the Legislature the unlimited control of the streets for a railroad, leaving the Corporation no voice in the matter.

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I have before stated my conviction, that these acts, if questioned by the Corporation, will never endure judicial investigation. They must be pronounced illegal.

The subject of the extent to which the regulation of a recognized power over property may be exercised by the Legislature, is one of delicacy. It is difficult to discriminate between what is pure regulation, and what defeats, or injuriously diminishes or obstructs a right. Several instances of the exercise of undoubted right, supervision and direction by the Legislature, are stated in chapter I, of this work. (See also Smith's Commentaries, sections 250–251.)

Lastly. Is there not a concurring necessity for the sanction of the Legislature, as well as that of the Corporation, for the establishment of a railroad in the city?

Mr. Justice Bosworth's views make such an act necessary, only, as I apprehend, for the purpose of repealing or modifying other previous acts of the Legislature, which interfere with the actual use of the streets in the particular manner. Mr. Justice Strong takes similar views. The assent of the Legislature is then requisite, because, either by its proper power, or with the assent of the Corporation, it has prescribed certain reglations at variance with the license, or the enjoyment under it. A simple consent of the Legisture to a proposed railroad removes these difficulties.

Of course, with the author's views, and his conclusions as to the cases, it is only for such purposes, that a legislative act can be necessary.*

Closely connected with the subject of streets, and the title to them, is the subject of the sources of title to the lands of the city. This has before been referred to. The diagrams in the Appendix and notices in Note 57 will illustrate the views and positions taken in this work.

* Appendix, (see the last Note.)

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CESSIONS.—A very large number of the streets of the city have been formally ceded to the Corporation. A book of cessions is to be found in the Street Commissioner's office. An enumeration of such streets will be found in the note.* It will be sufficient here to advert to an instance or two of cessions, to show their nature and legal operation.

On the 9th of April, 1761 (Book Cessions, p. 7,) Trinity Church ceded all the streets which had been run through the southern portion of the King's Farm, viz.: below Duane street, except the streets on the land before granted to the college. And the college made also a cession of such parts of the streets as were within its lands.

The conveyances remise, release, and forever quit-claim all and every the said streets so laid out on the several maps or plans so annexed. To have and to hold all and singular the respective streets, and *all* the right, title and interest therein, unto them the said Mayor, Aldermen, &c., and their successors, to be and remain forever public streets and ways for the inhabitants of the said city, and all others passing and returning through or by the same, in the same manner as the other public streets of the said city now are, or lawfully ought to be.

SECTION XII.

THE EXTERIOR LINE OF STREETS.

The discussion of the right to the four hundred feet necessarily led to a reference to the statutes fixing the exterior streets, chiefly as to West and South streets. The subject, however, requires a fuller investigation.

The ordinances of 1795 and 1796, passed preparatory to

* Appendix, Note 59.

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the application for the act of 1798, fixed the line of the streets, beyond which no grants into the river should be made, or any buildings or wharves erected. The petition also states the establishment of these outer permanent streets. And the statute of 1798 was to the same effect.*

There can be no question that the act of 1798 sanctioned the plan of the ordinances of 1796, and the map made according to them. Possibly a change might have been made under the phraseology of that act, prior to 1801 ; but in the latter act the phrase used is "according to the plan agreed upon," not "to be agreed upon."

It would be almost absurd to construe the statute as intending to empower the Corporation to change the exterior street, and carry it further into the river, as the Corporation should see fit. The line of West and South streets is therefore definitely fixed as those ordinances fixed it, except as the Legislature has sanctioned a change. Such a change was sanctioned as to part of West street, south of Albany basin, by the act of January 18, 1830. See note 35.

The grants of four hundred feet, contained in the acts of 1807 and of 1826, before referred to, involved the right of laying out exterior streets on the extremity. The present 220th and other sections of the act of 1813 would apply to an outer street on ground of the Corporation, and to any new line further in the river subsequently authorized.

The outer bulkhead formed the street, and was, in truth, a wharf; and the making of wharves and slips was one of the objects of making the grant of the four hundred feet, in the acts of 1807 and 1826.

It will be noticed that the act of 1798, re-enacted in 1813, as before stated, contained a clause, authorizing the

* See the ordinances, petition, and statutes, Notes 29, 30, and 31.

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Corporation to lengthen and extend West and South streets, as the buildings of the city shall be extended along the rivers. (§ 1.)

I do not find that this clause was acted under. On the contrary, we find the Corporation applying in 1628, and getting an act extending West street, from its then termination, to the Great Kill road.

On Loss' map, of 1807 (Street Commissioner's office), West street terminated at the State Prison, at Christopher street. Magnin's map, of 1804, carried the street only to a point a little above Charlton street. The act of 1828 authorized the extension up to what is now Gansevoort street. There it ran into the Tenth avenue. The act of 1837, establishing the Thirteenth avenue as the exterior street, from Hammond street to One Hundred and Thirty-fifth street, superseded this line of West street, for the space between Hammond and Gansevoort streets. (See Note 36.)

The act of the 13th of May, 1846, in relation to the Eleventh avenue, gave fresh and extensive powers as to the exterior street, for the spaces comprised in it. The statute will be found in note 37.

East River Line.—The map of the commissioners, under the act of April 3, 1807, laid down avenue D, from North street, now Houston, at the intersection of Columbia. From about Tenth street up to Thirteenth street, or Burnt Hill Point, it formed the nearest street to the river. Below, or to the south of this, some space intervened.

The same act, it will be remembered, gave to the Corporation four hundred feet below low water mark.

The "line of the grant of the Legislature," mentioned in this document, I understand to be the line of four hundred feet below low water.

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An act was passed on the 24th of January, 1824, by which a place called Market place was closed, and avenue D was extended northwardly from Seventh street so as to meet and unite with the same avenue at Tenth street.

In February, 1826, the Corporation applied to the Legislature,* and stated, that owing to the flat and low land, the uncertainty of the line of high water, the indentations of the shore, and other circumstances, between Grand and Twenty-third street, they have found it impossible to conform the regulation of that part of the city to the line of the grant from the Legislature, and that they had been obliged to make an exterior street, called Tompkins street, and other streets in conformity thereto; and they ask a confirmation of these proceedings.* Accordingly, on the 25th of February, 1826, an act was passed, and by the 2d section it was enacted that Tompkins street, along the East River, as laid out and approved by the Mayor, &c., shall be the permanent exterior street on the East River, between Grand and Twenty-third streets; and that all grants made or to be made by the Mayor, Aldermen and Commonalty shall be construed as rightfully made to extend thereto, and all the provisions of an act entitled an act to reduce several laws, &c., passed April 9, 1813, and the several acts amendatory thereof, and in addition thereto, shall be construed to apply to said Tompkins street.

On the 13th of April, 1826, another act was passed, by which the second section of this act of February 25, 1826, was repealed.† And it was enacted, that Tompkins street, along the East River, as laid out and approved by the Mayor, Aldermen and Commonalty, shall be the permanent exterior street on the East River, between Riving-

* Minutes of the Common Council, 1826.

† Laws 49th Session, ch. 166.

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ton street and Twenty-third street; and East street on the said river, between Grand street and Rivington street, as laid out and approved as aforesaid, shall be the permanent exterior street; and that all grants made or to be made by the Mayor, Aldermen, and Commonalty shall be construed as rightfully made to extend thereto."

Another act, however, passed on the 11th of May, 1835, authorized a change in this line to a certain extent.* It provided that the Mayor, &c., might adopt such a plan as they should deem most expedient for the regulation and laying out of that part of the said city which lies between Thirteenth street and Twenty-third street, the First avenue and the East River; and to designate and direct where the permanent exterior line or street to the eastward of such part of the city shall be, in place of that part of Tompkins street which now lies, or is laid out, to the eastward thereof, on the present map of the city."

"Such plan as may be adopted by the said Mayor, &c., for the regulation and laying out of the above-mentioned part of the said city, or for the permanent exterior line or street thereof, shall become and be deemed in law as part of the map or plan of the city."

This act was obtained on the application of the Common Council. The memorial may be found in the documents. It will be useful also to advert to the report of the Street Commissioner, Mr. Wright.† It is represented in both, that by the present plan, the exterior line would require a displacing of a great extent and depth of water, and great quantities of earth would be necessary to fill up the shore and a bulkhead to correspond with the line. They dwell upon the expense, and suggest and approve of a line within the limit of that authorized in the statute of 1826.‡

* Session Laws, ch. 268.

† Document No. 51, Board of Assistant Aldermen, 1832.

‡ Doc. No. 51, Board of Assistants, 1832.

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By a resolution, approved by the Mayor September 30, 1835, it was resolved that the plan of all that part of the city which lies between *Thirteenth and Twenty-third streets*, the First avenue and the East River, which was approved on the 8th of February, 1833, be adopted; and that the permanent exterior line to the eastward of such part of the city be designated and directed to be according to said plan; *Provided*, that the grants to Flack and Gouverneur, for land between high water mark and Tompkins street, and between Fourteenth and Twenty-third streets, be duly surrendered and canceled according to the conditions of a certain instrument of the 11th of April, 1835, deposited in the Street Commissioner's office."

It appears that the provisions of this ordinance were not complied with. I am informed, that the grantees named did not surrender their grants, which it is to be noticed carried them up to Tompkins street, between Fourteenth and Twenty-third streets.

On the 1st of January, 1840, a plan, or map of wharves and piers, made by D. Ewen, was adopted by both Boards, and approved by the Mayor the 11th of January, 1849. On this, East street is shown as the exterior line, from Grand to Rivington street, and Tompkins street, from Rivington to Thirteenth street.

By an ordinance, approved the 3d of July, 1850, it was resolved that the permanent exterior line of the city, on the East River, between Thirteenth and Twenty-third streets, be made to correspond with the plan as laid down on a map, drawn by Daniel Ewen, City Surveyor, and dated January, 1850.

On this plan Tompkins street is laid down on the line of 1826, to about Fourteenth street. It is then protracted to the north side of Fifteenth street on a straight line, leaving a strip to the eastward of such old line. The line

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then runs westerly along the north side of Fifteenth street to avenue D, and along avenue D to the north side of Eighteenth street, &c. Avenue B forms the line of Twenty-third street; and every part of this line, with a slight exception about Fourteenth street, and a trifling gore at Fifteenth street, is to the eastward of the old line of Tompkins street. This is my understanding of the map. It does not carry avenue D beyond Eighteenth street.

Beyond Thirteenth street, this ordinance of July, 1850, carries the exterior street avenue D beyond the line of April, 1826. I do not see how this can be justified. It might be plausibly defended if we read only the letter of the statute of 1835; but beyond all doubt, the memorial and ordinance of 1835 may be used to interpret it. It was clearly passed to sanction an inner line; not to extend a grant further into the river. It was an act passed *diverso intuitu;* and cannot, I think, justify the ordinance of 1850, in this particular.

It may be urged that at the point in question, the original exterior line in 1807 was avenue D. But the answer is decisive, that the act of April, 1826, superseded that line, and established the new one as fully and exclusively as if it had been the line established in 1807.

In the case of Nott *vs.* Thayer (2 Bosworth's Sup. Ct. Rep., 10), it was held by the Judge below:

First. That the establishment of the exterior line as proposed by the ordinances of July 3 and November 27, was wholly unauthorized; and *second,* that grants of the Corporation for any strips beyond Tompkins street, were invalid. The rights of the parties were adjudged upon Tompkins street being actually the exterior line of the city, at all the points involved in the controversy, from Fourteenth to Twenty-third street.

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The Court above, without expressing an opinion as to whether the Corporation could establish an exterior line outside or eastward of Tompkins street, under the act of 1835, concurred that no fee was given, even by implication, to the Corporation to lands under water to the eastward of that street, and no grants by the Corporation were valid; nor could any grants bounding on Tompkins street be extended by implication beyond it; nor had they had title to fill in the intermediate spaces and become the owners.

By the first section of the act of March 30, 1855, the Commissioners were, among other things, to submit to the Legislature the establishment of such exterior lines, along the water fronts of New York, beyond which no erection or permanent obstruction should be permitted.

In the Commissioners' report of 1857, they state that they have laid out an exterior line from Hammond street, on the North River, to Corlears Hook, on the East River.

In this report of January 27, 1857, they speak of another ordinance of the Common Council, passed in December, 1856, laying down an exterior line from Rivington to Thirty-eighth street, on the East River, far beyond the limits assigned by the Legislature, and characterize it as in direct violation of the act of 1807, and of that of March 20th, 1855.

By the act of March 30, 1855 (Sess. Laws, ch. 121), a Board of Commissioners was created, to ascertain the present condition of the harbor of New York, particularly whether the navigation thereof is improperly obstructed, and whether any further extension of piers, wharves, or bulkheads into the said harbor ought to be allowed, and to what extent, &c.

They were also to submit to the Legislature the establishment of such exterior lines, in different parts of the said

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harbor, opposite and along the water fronts of the cities of New York and Brooklyn, the county of Kings, and county of Richmond, beyond which no erection, or permanent obstruction of any kind, should be permitted to be made.

And to submit, with their report, maps of the said harbor, exhibiting the exterior lines recommended by them, and the lines of the existing piers, wharves, and bulkheads, and of any grants of land under water in the said harbor, which have not been occupied; and also the original shore line, as far as the same can be ascertained.

No grants of land under water, in respect to which the Commissioners were authorized to report, should be made by the Commissioners of the Land Office, the Common Council of New York, or by any board, officer, or corporation, until the further direction of the Legislature in the premises.

By an act of April 17, 1857, it was enacted that the bulkhead line, or line of solid filling, and the pier line adjacent to the shores of the port of New York, are hereby declared and established to be the bulkhead and pier line recommended to the Legislature by the Commissioners appointed under the act entitled "An act for the preservation of the harbor of New York from encroachments, and to preserve the necessary navigation thereof," passed March 3d, 1855, their reports of January 27, 1857, and March 18, 1857, and as laid down on the maps accompanying such reports, entitled, Atlas of New York Harbor, made under the direction of the Harbor Commissioners, in two volumes, except that the exterior or pier-head line, from Ninth street, extending to Forty-ninth street, on the New York side of East River, shall be the same as in the line recommeded by the Committee of Commerce and Navigation, of the Senate, in their report of March 17, 1856, and on the maps hereinafter referred to, in red ink;

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and a sea-wall shall be erected on that line, from the north-east corner of the bulkhead, at the foot of Seventeenth street, to Thirty-eighth street, with openings of not less than one hundred feet, and at a distance of not less than four hundred and fifty feet apart, from centre to centre; and the whole water space between the bulkhead line hereby established and the sea-wall between Seventeenth and Thirty-eighth streets, shall be appropriated for piers on piles or blocks, and bridges, and wet basins, and a continuous bulkhead from Thirty-eighth to Forty-ninth street; which bulkhead shall be the exterior line, and line of solid filling; but no pier, or other erection or structure, shall be made outside of the said sea-wall or bulkhead, from Seventeenth to Forty-ninth street, that is to say:

1. Maps of the shores of the city and county of New York.

2. From a point one mile north of Spuyten Devil Creek, on the east shore of the Hudson River; thence southerly to the entrance and along the north shores of Spuyten Devil Creek and Harlem River; and easterly along the north shore of the East River, to Throgg's Neck, in the county of Westchester.

Four other maps are specified.

The second section provides, that it shall not be lawful to fill in with earth, stone, or other solid material, in the waters of the said port, beyond the bulkhead line, or line of solid filling, hereby established; nor shall it be lawful to erect any structure exterior to the said bulkhead line, except the sea-wall mentioned in the first section of this act, and piers which shall not exceed seventy feet in width respectively, with intervening spaces of at least one hundred feet; nor shall it be lawful to extend such pier or piers beyond the exterior or pier line, nor beyond or outside of the said sea-wall.

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The Commissioners were, within thirty days, to file in the office of Secretary of State such maps, with a minute written description, by courses and distances, as far as practicable, of the aforesaid lines in front of the cities of New York and Brooklyn, and a copy of the description of said courses and distances in the office of the Street Commissioner of the city of New York. (See also act of 17th April, 1860, *ante*, p. 193.)

Exterior street on Harlem river.

An act of the Legislature was passed on the 14th of April, 1852, empowering the Mayor, Aldermen, and Commonalty to lay out and fix a permanent exterior street along the shore of the Harlem River, in the city of New York, between the East River or Sound, and the North or Hudson River, and to cause a map thereof to be made; and which map, when approved of and ratified by the said the Mayor, Aldermen, and Commonalty, shall be filed in the office of the Street Commissioner of the said city.

By the second section, the streets and avenues, as laid out on the map of the Commissioners of 1807, or as subsequently established by law, shall be continued and extended along the present lines thereof, from their present termination on such map respectively to the said exterior street and permanent line. The third section is as follows: "The Mayor, Aldermen, and Commonalty of the city of New York shall be, and they are hereby, vested with all the right and title of the people of this State, to the lands covered with water along the shore of the said Harlem River, from the East River or Sound to the North or Hudson River, and extending from low water mark to and including the said exterior street or permanent line."

§ 4. "The proprietors of all grants of land under water, or owner or owners of all lands adjacent to those hereby granted, shall have the pre-emptive right in all grants

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which may be made by the said the Mayor, Aldermen, and Commonalty of the city of New York, of any of the lands under water granted to them by this act, adjacent to and in front of said lands under water, heretofore granted by the said the Mayor, Aldermen, and Commonalty of the city of New York."

The distinction taken in our Courts as to the boundaries of New York, upon a point of jurisdiction, and one of right of property, has been before noticed. Although by the charter of Montgomery the limits of the city ran to low water mark on the Westchester side of Harlem River, yet this was jurisdictional only. The right of soil was defined by low water mark around Manhattan Island. No grant of four hundred feet applies to any portion of the line along the Harlem River.

The third section then releases the right of the State to all the strip between low water, and that line which shall be fixed upon as the exterior line of the permanent street. The depth of the grant into the river is left undefined; and the Corporation may, therefore, go as far as they think proper, provided they do not seriously impair the navigation of the stream. The character of that navigation varies so much in different portions of the stream, that this restriction will vary much in its application at different points.

By the second section of the act of April 27, 1860 (Session Laws, 1803), it is provided, that it shall not be lawful for any person to build, erect, or maintain, any pier, bulkhead, or other structure, or to fill in with earth or other material, in the waters of the harbor of New York, beyond the exterior line defined and recommended by the Commissioners for the preservation of the harbor of New York, and established in and by chapter 763 of the Session Laws of 1857; and in case of the building or erection of

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any such pier, bulkhead, or other structure, or of maintaining of any such pier, bulkhead, or other structure, whether now existing or hereafter erected, the Board of Commissioners of Pilots shall notify the person or persons building, erecting, or maintaining the same, within a time to be specified and prescribed in their notice;* and in case of failure to comply with such notice, the said Board of Commissioners of Pilots shall have power to cause so much of the pier, bulkhead, or structure, as is beyond the exterior line so defined and established, to be forthwith removed, and the person or persons, who built or maintained the same, shall be liable to pay all expenses of such removal, to be recoverable by, and in the name of the Commissioners of Pilots, and shall also pay a fine of $25 a day for each and every day during which such obstruction shall remain after such notice, and until such pier, bulkhead, or other encroachments shall have been removed, as herein provided.

By the third section of this statute, the act of April 17, 1857, the line of the bulkhead and pier therein established was altered at the village of Port Morris, in Westchester county. See the section for the lines and boundaries.

(See, for reports under this act, Appendix, Note 61.)

SECTION XIII.

ROADS, AS DISTINGUISHED FROM STREETS.

It is of no little importance, in considering this subject, to advert to the fact, that roads, as distinguished from streets, were sometimes laid out through parts of the city.

In November, 1673, a particular set of instructions was given to the overseers of fences and highways, between the Fresh water and Harlem. The under sheriff and schepens

* Of what are they to give notice?

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of the suburbs, between Harlem and Fresh water, were to perform various duties. And among other things the schout was to receive a bounty for every wolf shot on the island this side of Harlem.

So in the boundaries of the wards, in 1683, the Out ward is to contain the town of Harlem, with all the farms and plantations on the island of Manhattan, from the north side of the Fresh water.

An order was passed on the 18th of April, 1671, by which the magistrates of Harlem and overseers of the highway, beyond the Fresh water, were to lay out anew the carriage-way between the city and the village of Harlem. See also an order of the 16th of February, 1672.

The first statute I have traced, is that of the 6th of May, 1691.* It provided that the freeholders of each town in the province should be authorized to choose annually three overseers for the laying out and amending the highways and fences within the bounds and limits of their respective towns; who were empowered to lay out, set forth, regulate, and amend, all such highways and fences as should be established in such manner, form and way as should be agreed upon by the majority of the freeholders of each of such towns, subject, however, to the consent and approval of the next Court of Sessions of the peace; otherwise to be of no force or virtue.

This act did not extend, or was not supposed to extend, to the city of New York; for we find that on the 1st of October, 1691, the statute before mentioned, relating to the streets, was passed.

In June, 1703, an act was passed for laying out public roads or highways throughout the colony. It provided, among other things, that there should be laid out, preserved, and kept forever, one public road, or highway, to

* 1 Smith & Livingston, 3.

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extend from the now site of the city of New York, through the city and county of New York, and the county of Westchester, to be a public highway from the city of New York to the colony of Connecticut. The road was to be four rods wide. (Smith and Liv., vol. 1, p. 54.)

Commissioners were appointed to lay out the roads in the several counties of the State. For New York, William Anderson, Elem Elsworth and Peter Oplenus were appointed. (See an abstract of the act, Appendix, No. 60.)

This act was renewed in 1705, and again in 1708, in 1713, and in 1720.*

It seems, then, to have been allowed to expire. A system for each separate county appears to have prevailed. (See Smith and Livingston, vol. 1, pp. 204, 345, 360, 420.)

Under the act of 1703, a survey of a public highway, or highways, was made by the Commissioners, the 16th of June, 1707. It is found in Valentine's Manual for 1860, p. 568, and I have transcribed it in the note, No. 60.

The Corporation, on the 16th September, 1735, passed a resolution, that the surveyors do lay out a public road from the house of Benjamin Peck, in Queen street, to the Fresh Water, as the same was laid out on the 21st June, 1751, by William Anderson and others, appointed by an act of the General Assembly, made in the second year of Queen Ann, entitled "An act for laying out public highways through this colony." So on the 9th February, 1735, the highway was ordered to be laid out, from Spring Garden to Fresh Water, and from the gate at the end of Queen street, to meet the other road at Fresh Water.

It is clear, from records and documents, that this part of the road was treated and used as a public highway, long before the resolution cited. Lynes' map of 1728

* Smith and Liv., p. 138.

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shows this very fully. The resolution was, I presume, only intended to have the surveyors define, with accuracy, the courses and lines.

This act of 1703 may have been necessary, because the highway was to extend, not only through Harlem, but also through Westchester county to Connecticut.

An act entitled "An act for mending and keeping in repair the Post Road from New York to King's Bridge," was passed the 23d of October, 1713; revived the 19th November, 1720; again on the 21st August, 1728, and on the 10th November, 1736. It was repealed, and an amended act passed on the 7th of November, 1741.

The title is, "An act for mending and keeping in repair the post road from New York to King's Bridge." Its recital is: "Whereas, the highway or post road through Manhattans or York Island, leading from the city of New York to King's Bridge, ought to be kept in good repair." All former acts were repealed; and it was provided, that so much only of the general highway or road as to the present dwelling-house of Joachim Anderson, shall be repaired by the inhabitants of the several wards within the city, except the Out ward; and all that part from the house of Joachim Anderson to the limits of Harlaem patent, by the inhabitants of the Bowery division of the Out ward; and all the remaining part of such highway, from the southerly limits of Harlaem patent to King's Bridge, shall be cleared and repaired by the inhabitants of Harlaem division, as hath been formerly done. The quarter sessions were to appoint surveyors of the road to King's Bridge.

Then, on the 25th November, 1751, an act was passed, reciting that the commissioners under the act of the 2d of Queen Ann (1703) did lay out a road of the breadth of four rods, from the now dwelling-house of John Horne, through Bloomendale district or division, to the now

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dwelling-house of Abraham Hoogelandt; that the inhabitants of Bloomendale district being few in number, were at great hardships in keeping the road in repair, but also from being obliged to work on the post road between New York and King's Bridge. Provisions were then made for the inhabitants of that district working their part of the road, and exempting them from working on the post road leading from New York to King's Bridge.

On the 20th of November, 1764, by an act entitled "An act for the better regulating public roads in the city and county of New York," the Mayor, &c., were appointed commissioners of highways and roads in that county, to repair and keep in order the roads. They were given authority to widen or alter any existing road, not to exceed four rods, upon getting the damages assessed by a jury. They could close a road with the owner's consent. They had no power as to opening new roads. (Van Schaick, 458.)

This act was renewed 30th December, 1769, (ibid., 547;) again on the 22d January, 1772, (ibid., 663;) so on the 8th of February, 1774, to expire the 1st of February, 1777.

On the 21st March, 1787, the Mayor, Aldermen, &c., were, by an act of that date, appointed commissioners to regulate and keep in repair the present public roads or highways, and to lay out, regulate and keep in repair such other public roads or highways as shall be laid out hereafter in the said city and county. They were empowered to widen or alter all public roads, not to exceed four rods. If in widening or altering any public road now in being, or in laying out any public road or highway hereafter, the commissioners shall take or require the lands of any person, they were to give him notice. They were authorized to treat with him; and if he refused, they were to issue a precept to the sheriff, to empannel a jury to inquire of and assess the damages and recompense due to the owner of

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such land. The jury was to assess the damages and recompense, as they shall judge fit to be awarded to the owner or owners of such land, according to their several and respective interests and estates in the same; and the verdict and judgment of the Mayor's court thereon, and the payment or tender of the amount, shall be binding against the said owners, their heirs, &c., claiming any interest or title in such lands, and shall be a full authority to the said commissioners to cause the said land to be converted to and used for the purposes aforesaid.

This act remained in force until the system of the act of 1807, followed by that of the act of 1813, superseded it, except that by the 193d section of the latter act (the general act to reduce, &c.), the Mayor, Aldermen, and Commonalty were to continue to be Commissioners to regulate and keep in repair the present roads and highways, and such roads or highways as should thereafter be opened.

From this review it is apparent that no roads or ways were opened through the county of New York without compensating the owners, unless they were laid out under the act of 1703 and its renewals. The last I have traced was in 1720. What were the roads so laid out? I think there were none, except the old post road, the Bloomendale road, the Greenwich lane and Art street, and one other not clearly ascertained. In the Note, No. 60, I have stated the details as to these roads, with the evidences I can find as to their courses, and periods of being opened.

A few notices as to laws regarding roads not in the county of New York may be useful.

After the Revolution, an act was passed on the 4th of March, 1784. It extended to most of the counties of the State. Suffolk and Richmond were afterwards added. It did not include New York. By its provisions, if the road

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was laid out *through improved or inclosed land*, compensation was allowed, to be fixed by two justices and twelve men. The counties and towns were to pay the damages in the same manner as the common public charges were defrayed. No highway was to be run through an orchard or garden, without the consent of the owner.

This act was repealed, and a new one was substituted on the 6th of April, 1801 (Sess. Laws, 24th sess., chap. 186), and this applied to all the counties except New York, Suffolk, Kings, Queens and Richmond. The Commissioners were authorized to lay out new roads. The fifteenth section contained the same provision as in the act of 1784, that where the road was run through inclosed and improved lands, compensation was to be made, through a jury, *for the damages sustained by the owners by reason thereof.* There was the same prohibition against running through orchards and gardens without a consent.

The act of March 19th, 1813 (Sess. Laws, 36th sess., chap. 33), renewed these provisions, with modifications, and added other clauses. A power was given, in the first section, to discontinue old roads, as well as to open new ones. The provisions as to running a road through improved lands, or orchards of a certain growth, were substantially the same.

This act, however, contained in the 10th section a new provision. When any road shall run through the lands of any person, *or along the boundaries thereof*, in whole or in part, and the same shall become unnecessary, or be discontinued, by reason of some other road to be established and laid out by virtue of this act through the lands of the same person, the jurors or commissioners making the assessment shall take into calculation the value of such road so discontinued or become unnecessary, and the benefit resulting to such person by reason of such discontinuance, and make

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deduction from the amount of such assessment accordingly, and the balance, and no more, shall be the sum to be paid for the opening such new road; and thereupon it shall be lawful for the owner of the land to inclose so much of the road, so discontinued or become unnecessary, as shall run through his land, or *along the boundaries thereof.*

This section is re-enacted in substance in the 88th section of the General Highway Act (Part 1, Tit. 1, Art. 1, Chap, 16). The clauses italicised are omitted.

The general principles of the act of 1813, are found in the existing law. (1 R. S., 628, &c.)

But a marked variation of language is to be found in the former statute, that of April 2, 1801, (Sess. 24, chap. 111,) relating to the counties of Kings, Queens, Suffolk and Richmond, which act, I believe, remained in force until that of February 23, 1830 (chap. 56). The language there is, that the Commissioners *should not lay out any road through any person's land without paying him the true value of the land so laid out into a highway or road,* with such damages as he shall sustain thereby (§ 1). The twelve freeholders summoned are to assess the value of the lands and damages, with the charges, and the same are to be raised among the contingent charges of the county.

The act of 1830 deviates from this phraseology, and adopts that of the general statute, viz.: *damages caused by the laying out of such highway.*

In the Note (No. 60) the proceedings in relation to the middle road are stated.

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SECTION XIV.

MARKETS.

The ordinance of 29th January, 1676, recites, that "a fit house was built by the water side, near the bridge and weigh-house, for a weekly market; and directs the days for holding the markets, and exempts every one going to or returning from them from arrest for debt.

In March 1683, Tuesday, Thursday and Saturday in each week were appropriated for market days, by ordinance of the Common Council. Engrossing and forestalling were forbiden under penalties.

In May, 1684, the market was ordered to be removed from its then location to the open ground before the Fort, (the Bowling Green).

It would seem that the old market was not given up. See ordinance of February 18th, 1692.

By Dongan's charter of 1686, it is recited that the city had built and appropriated two market houses, which were confirmed to it (§ 1).

On the 9th of September, 1699, on the petition of the inhabitants of Queen street, permission was given for the erection of a market at Countess key, at the petitioners' charge, for the public benefit.

In February, 1700, the market-house was granted to the inhabitants of the South Ward for fifty years, they erecting the building, and paying £12 rent.

July the 8th, 1701, liberty was given to the inhabitants of Burger's path to erect a market-house upon certain vacant lots of ground.

1706, June 20th, pursuant to the order of this court of the 6th September, 1699, authorizing the inhabitants of Queen street to build a market, it was ordered that the market-house to be built at the north end of the slip at

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Countess key should be appointed and continued as a public market-house and market forever.

In 1709 permission was given to the inhabitants of the East Ward to erect a market-house at the south end of Clark's slip, at the end of Wall street.

On the 17th of November, 1731, a law was passed by the Common Council, regulating the public markets. It declares the following to be such markets:

1. Market-house at the slip commonly called Coenties slip.

2. Market-house at the Old slip, commonly called Burger's path.

3. Market-house at the lower end of Wall street, commonly called Wall street Market-house.

4. Market-house, at or near Countess key, commonly called Countess slip.

The charter of Montgomery (1730, § 17) declares that the Mayor, &c., and their successors may hold and keep markets at five several places—at Coenties dock, Old slip, Countess slip, at the lower end of Wall street, and by the Long Bridge. The last, no doubt, was the old market at the bridge.

The charter then provides, "and also we, &c., grant unto the said Mayor, &c., that they and their successors shall and may have, hold, and keep such and so many other markets, at such and so many other times and places in the said city of New York, as shall, from time to time, be ordered, established, erected and appointed by the Common Council of the city aforesaid, for the time being, or the greater number of them" (§ 17).

In 1735 the Common Council assumed the control of all the markets, and adopted the system in general, of leasing the stalls.

I do not find an act of the Assembly or Legislature upon

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the subject of the markets in the city, until the act of 1813 (ch. 80, § 272), except that in a statute of 11th November, 1692 (S. and Liv., 11), there were some general provisions regulating the mode of conducting them.

The Common Council had repeatedly exercised, by ordinance, every power connected with markets, the sale of meats on Sunday, regulation of butchers, &c., which are conferred upon them by the statute of 1813; (ordinance of 1799, pp. 1 and 6; 1807, 1 and 66; 1812, pp. 1 and 154.) The act merely empowered the Corporation to regulate or prohibit the sale of provisions on Sunday; to regulate the butchers, and assign places for their business, and to prohibit any persons but licensed butchers from performing their business.

By an act of March 22, 1822 (ch. 101), it was enacted, that it should be lawful for the Mayor, Aldermen and Commonalty of the city of New York, in case they shall find it necessary, to cause public markets to be erected and kept over the waters of the East and North Rivers adjoining to any of their docks or wharves in the city of New York: *Provided*, that such markets shall not interfere with the flow of the waters of the said rivers, nor be built over the same so as to occupy a distance exceeding one hundred feet from the lines of the city, as established by law on said rivers.

I understand this provision to permit the erection of markets for one hundred feet beyond the four hundred feet line, or that established by the ordinance map, and act of 1796–7. These designated the lines of the city.

WASHINGTON MARKET.

On the 19th of August, 1771, it was decided that a market should be erected at the Corporation lots to the northward of Dies Dock; that if it be erected by the

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neighborhood, it should not exceed two hundred and ten feet in length and thirty feet in breadth.

On the 22d of August, 1771, a plan was submitted, and approved.

28th October, 1771, Mr. McAdam and others remonstrated against erecting a market in the vicinity of one they had built at the cost of £500.

1772, January 7, Abraham Mesier informed the Board that he and others had erected a market at the North River, which they wished to convey to the Corporation.

On the 1st July, 1805, the Market Committee was ordered to run a bulkhead across the slip at Hudson market, and to erect a substantial market on the ground.

For reasons stated in the report of a Committee, made the 10th of February, 1812, proceedings under these resolutions had been suspended.

On the 1st of June, 1812, a Committee was empowered to sell the Greenwich street lots, and to erect a market to cover the block bounded by Washington, West, Partition, and Vesey streets, forming a hollow square in the centre for the vegetable and fruit dealers.

In January, 1813, seven lots of ground on Greenwich street, on part of which the Hudson Market stood, were sold.

In 1812, a part of the market was built, being the whole length along Washington street, and fifty feet down Vesey and Partition streets.

West Washington Market case.

The West Washington Market case, as it is designated, involves various propositions of consequence.

The Corporation of New York filled up a plot of ground under water of about 400 feet square, in front of the old Washington Market, and gave permits to a large number

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of persons to erect stalls or sheds, for the sale of meats and vegetables, at fixed weekly rents. Afterwards, and about the 24th of April, 1858, while the city was thus in possession, the Commissioners of the Land Office, in the name of the People of the State, executed to Taylor and Brennan a lease of the whole plot, at a rent of $5,000 for one year, with a covenant to maintain them in peaceable possession.

Taylor and Brennan brought ejectment against the city and the tenants.

They amended the complaint, making the people co-plaintiffs, praying for delivery of possession, and $100,000 damages for the rents, issues, and profits, during the unlawful withholding.

Passing over a variety of proceedings not connected with my subject, it appears that an order of reference was made to three referees, to hear and determine the cause.

On a trial before Mr. Justice Potter, in September, 1859, a jury had found that the People of the State were seized of the strip of ground west of a line drawn parallel with the westerly line of West street, and distant forty-eight feet westerly therefrom, and between the southerly line of Dey street and the northerly line of Vesey street.

The referees refer in their report, dated December 10, 1859, to this verdict and judgment, and consider it conclusive. They proceed to examine the case, however, upon the facts and law.

They refer to the charters granting the soil of vacant lands to low water mark, and four hundred feet beyond.

They refer to three grants by the Corporation: one to Derck Dey, of the 14th of October, 1743; one to Columbia College, of the 16th of August, 1770; and one to Trinity Church, of the 17th November, 1773. They con-

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sider these grants to establish the line of low water, and that the premises in question were over four hundred feet beyond such line of low water mark. Various maps, such as Ratzen's, of 1776, Hill's, of 1782, Trinity Church map, of 1773, are referred to as evidence to be acted upon.

They conclude that an unquestioned title was vested in the State to the premises in question. That Taylor was lessee of the People from the 24th of April, 1859. That the city had been in possession, receiving the rents and profits. That the plaintiff was entitled to recover the premises, and also the sum of $54,000, for mesne profits.

In another action, brought for mesne profits, the referees found that the grantees of the State were entitled to recover the sum of $436,000.

They held, that the Commissioners could grant a lease of the premises, and the mesne profits accruing under such lease. That they could also transfer a title to back mesne profits. Judgments were entered upon these reports, but were subsequently set aside by the Court, on motion, on the ground of an excess of the power of the attorney to bind the Corporation by certain stipulations.

A compromise was then made between the city and the Commissioners of the Land Office, by which the Corporation settled the outstanding claims to the premises.

FULTON MARKET.

On the 18th of January, 1816, a committee before appointed on the subject of a new market near Beekman slip, in lieu of the present Fly Market, reported the probable cost of the block on the east side of Beekman slip to be, in the aggregate, $220,000.

On the 16th December, 1816, a resolution was adopted, appointing a committee to consider the propriety of taking for a market-place the ground between Water and Front

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streets, and Burling slip and Fulton street, on which lots the buildings were destroyed by the late fire, in lieu of the ground at Beekman slip, heretofore taken.

By an act of the Legislature of April, 1816 (Session Laws, ch. 53), it was recited that the Corporation were desirous (as by their memorial appeared) to take the block of ground "bounded south-westerly by Beekman slip, north-westerly by Front street, north-easterly by Crane Wharf, and south-easterly by the East River, for the purpose of erecting thereon an extensive and commodious public market; with the right of disposing and converting the said lands and premises for other public purposes, or otherwise, whenever they or their successors may deem the continuance of the market there unnecessary, and were willing to pay the whole expense thereof, and that the said prayer appeared reasonable. Commissions were thereupon directed to be appointed to appraise the lands," &c. And it was enacted (§ 1), that the report, when confirmed by the Court, should be final and conclusive, as well upon the said Mayor, Aldermen, and Commonalty of the city of New York, as upon the owners, lessees, and persons, and parties interested in and entitled unto the lands, tenements, hereditaments, and premises mentioned in said report, and also upon all other persons whomsoever. And on such final confirmation of the said report by the said Court, the Mayor, Aldermen, and Commonalty of the city of New York shall become and be seized in fee simple absolute of all the said lands, tenements, hereditaments, and premises in the said report mentioned," and thereupon may take possession of the same, without any suit or proceeding at law for that purpose.

By a further act, of March 14, 1817 (Sess. Laws, chap. 75), it was recited, that the Mayor, &c., had represented that the public convenience of the city required that they

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should become possessed in fee simple of the parcel bounded south-westerly by Fulton street, lately called Beekman's slip, north-westerly by Front street, north-easterly by Crane wharf, and south-easterly by a line running north-easterly, in the direction of the north-westerly side of South street; and of all the wharves and piers fronting the south-easterly side of the above-described premises, and contiguous to South street. Thereupon Commissioners were directed to be appointed by the Supreme Court, in the usual manner, and with the usual powers. It was enacted that their report should be final and conclusive, in the form of the clause in the previous act of 1816. "And on such final confirmation of the said report, by the said Court, the Mayor, Aldermen, and Commonalty of the city of New York shall become and be seized in fee simple absolute of all the said lands, tenements, hereditaments, and premises before mentioned, and of the appurtenances, privileges, and advantages to the same belonging, or in anywise appertaining." The Corporation was also authorized to take possession of the land under water immediately, and of the residue, at any time after the first of May, 1818.

It appears that measures were not consummated to take the property, under these acts of the Legislature, until October, 1820. A report was made, and resolutions adopted, directing the Counsel of the Board to take measures to complete the proceedings already begun, for the purpose of vesting in the Corporation the title to the lands mentioned in the act of March 14, 1817; and that he prepare a petition to the Legislature authorizing the Corporation to sell and convey such lands.

But, on the 4th of December, 1820, William Slosson and Ogden Edwards gave an opinion to the Common Council, that "the Legislature, by declaring in express terms the nature of the estate, intended to vest in the

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Corporation the absolute power of disposing of the property; and that the Corporation, when they shall have acquired the title, will have the power to sell the same, or any part thereof, as the entire and absolute owners, for any purposes."

A resolution was then passed, rescinding the resolution as to an application to the Legislature.

The market appears to have been erected between March and December, 1821. On the 3d January, 1822, a sale of the butchers' stands was made at auction, under the superintendence of the Market Committee.

The market, as erected, was on the block formed by Fulton, Front, Crane wharf, and South street.

CATHARINE MARKET.

1786, May 31, a petition was presented by inhabitants in the vicinity of Catharine street for liberty to erect a public market at Catharine slip. Petition granted, and committee appointed to determine the place, and mode of building, &c. On the 28th of June, 1786, Mr. Henry Rutgers informed the Board that the market-house at Catharine slip was erected, and ready for the reception of butchers, &c.

Resolved, That the said market-house be established as a public market-place, and subject to the rules and regulations of the other market-places in the city.

The land belonged to the Corporation.

FRANKLIN MARKET.

The market at Old slip, established at the date of the charter, came to be called by this name.

GOUVERNEUR MARKET.

The meat market, at the foot of Wall street, shown on Lynes' map, supposed of 1728, is so distinguished.

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ESSEX MARKET.

This market was first erected in 1823. On the 27th October, 1823, the market committee reported in favor of purchasing seven lots of ground, on the north side of Grand street, between Ludlow and Essex streets; and a resolution to that effect was adopted. A large number of lots was afterwards purchased, and a deed for fourteen lots was received from Mr. Gouverneur on the 1st of November, 1823. (Lib. 171, p. 295.)

The ground on which this market stands was also acquired in several parcels; from R. Tillotson, by deed of March 4, 1834 (lib. 311, p. 4); from Thomas Knox, by deed of the same date (ibid., p. 7); from O. Managhan, by deed of August 8, 1835 (lib. 341, p. 169); and from James Killin, by deed of the same date (lib. 341, p. 171).

CLINTON MARKET.

By an act of the Legislature of 1827 (Session Laws, ch. 214), it was recited that the Mayor, &c., had represented that the convenience of the city required that they should become possessed, in fee simple, of such of the lands and premises as they do not already possess, bounded northerly by Spring street, eastwardly by Washington street, southwardly by Canal street, and westwardly by West street, for the purpose of a public market, which they contemplate establishing thereon. The act then provides, that the Corporation may contract with the owners of the land; or may apply to the Chancellor, Judge of the Circuit Court, or first judge of the Court of Common Pleas, who may issue writs, in the nature of a writ *ad quod damnum*, to be directed to the sheriff, to summon a jury to appraise the damages to be sustained by the owners.

Various other provisions are contained, and it is directed that, upon the inquisition being confirmed by the Court,

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it shall enter judgment, that the Mayor, &c., paying the moneys, &c., shall be entitled to hold, and become seized in fee simple absolute of all the lands and tenements in the said inquisition mentioned.

By the fifth section, it was made lawful for the said Mayor, &c., or their successors, whenever they shall deem the continuance of the said market upon the aforesaid premises unnecessary, otherwise to dispose of said premises, or to convert them to any other public purpose or purposes. On the 10th of September, 1827, G. Chichester executed a deed to the Corporation for a portion of the ground now occupied as the market site. (Lib. 226, p. 335.)

And on the 22d November, 1827, John Green and others granted to the Corporation another parcel of such premises. (Lib. 228, p. 265.)

The residue of the premises taken belonged to the Corporation, under the charters.

CENTRE MARKET.

On the 17th September, 1817, A. Kew and M. Martin conveyed to the Corporation a parcel of land, now occupied by part of the market. (Lib. 123, p. 126.)

By an act of May 2, 1836 (Session Laws, ch. 232), "to vest certain lands in the Mayor, &c., for the purpose of enlarging Centre Market," the Corporation was authorized to acquire the title to the parcel of land herein described, by commissioners to be appointed.

In December, 1837, the Supreme Court confirmed the report of the commissioners.

UNION MARKET.

By an act of the 22d of April, 1834, the Mayor, &c., were authorized to acquire title to, and become the owners

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in fee of, the land in the Seventh Ward, bounded, northerly, by Grand street, 140 feet 1 inch; easterly, by Corlaers street, 119 feet; southerly, by Lombardy, commonly called Monroe street, 125 feet; and westerly, by land belonging to the estate of George Lorrillard, 181 feet 6 inches; also, of the parcel situate in the Eleventh Ward: bounded, northerly, by Second street, 202 feet 10 inches; easterly, by avenue D, 21 feet 3 inches; southerly, by North street, 198 feet 6 inches; and westerly, by a line drawn in direct continuation of the easterly side of Sheriff street, from North street to Second street, 46 feet 6 inches.

Commissioners were to be appointed by the Supreme Court. The usual powers are given them by various sections. By section 9, "on the final confirmation of such report by the said Court, the Mayor, &c., shall become and be seized in fee simple absolute of all the said lands, tenements, hereditaments, and premises before mentioned." There is also the usual clause authorizing possession to be taken.

On the 21st of November, 1834, the Supreme Court confirmed the report of the Commissioners.

JEFFERSON MARKET

Lies between Greenwich avenue, Sixth avenue, and Tenth street. March 1, 1832, one parcel was purchased from A. Bloodgood and others (lib. 286, p. 357); March 1, 1832, another parcel from J. C. Thwing (lib. 287, p. 246); August 10, 1837, another parcel from Andrew Smith. (Lib. 377, p. 426.)

TOMPKINS MARKET.

By an act of 25th April, 1829 (Sess. Laws, ch. 267), it was provided, that it should be lawful for the Mayor, &c., to cause a public market to be erected upon that certain

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piece of land, whereof they are now seized in fee simple, situate in the Eleventh Ward of the said city, along the easterly line of the Third avenue, and between Sixth and Seventh streets, being 181 feet 9 inches on the easterly and westerly sides thereof, and 100 feet on the northerly and southerly sides thereof; and such market shall be known and designated by such name as may be determined by a resolution of the Mayor, &c., in Common Council convened.

By section 2, the Common Council was authorized, whenever they should deem the continuance of the market on the premises unnecessary, to convert such premises to any other public purpose or purposes, or otherwise to dispose of the same, as they may think fit.

By section 3, the Common Council was authorized to open a street, between Sixth and Seventh streets, of fifty feet wide, by appropriating land of which they were seized; to be, to all intents and purposes, a public street, and its name to be designated by the Common Council.

On the 23d December, 1828, Charles Henry Hall conveyed to the Corporation the parcel of ground referred to in the act of April 25th, 1829, with a street forty feet wide in the rear. (Lib. 244, p. 439.)

The street was laid out, and called Hall place.

See, further, the resolution of purchase, 25th December, 1858, and that for an application to the Legislature, 9th March, 1829.

MARKET, AVENUE C AND EAST RIVER.

See the opinion of Ingraham, Justice, in The People *vs.* Lowber, 1858; Nott *vs.* Thayer, 2 Bosworth, 50. Deed from R. W. Lowber, March 10, 1857; Lib. 772, p. 326.

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A compromise was effected, and the right and title of the State purchased by the Corporation for this market site.

Power to erect new markets.

It seems quite settled, that the power granted by Montgomerie's charter authorizes the Corporation to erect new markets, when deemed necessary for public convenience, and for such purpose to purchase and hold lands. (The People *vs.* Lowber, 7 Abbott's Rep., 158; Ketchum *vs.* City of Baltimore, 14 N. Y. Rep.)

But the power to build or repair markets is subservient to the rights conferred upon the public, by the dedication and opening of a public street, over its own land, by the Corporation. The occupation of such a street, and obstructing the use of the same for the reparation of a market adjoining it, is, in strictness, unlawful, and a breach of the implied contract between the public and the city. It is of special damage to the owners of houses built upon the street. An injury is more likely to arise to them than to others. (St. John *vs.* The Mayor, &c., 3 Bosworth, 483.)

This rule does not prevent the Corporation from temporarily obstructing a portion of the street, by piling materials, or making preparations essential to repair a public market. They grant permits, for similar purposes, to individuals. But that is widely different from erecting and keeping market sheds on a highway, during an indefinite period, to the manifest detriment of the adjacent owners. (Ibid.)

The Court has refused to interfere in favor of a party who had a license to use a stall, which encroached upon a public street.

The case of Allerton *vs.* Delavan, Special Term, Supreme Court, 1861, was this:

The plaintiffs were assignees of an insolvent butcher,

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who occupied a stall attached to Washington Market, but situate in West street, outside the curb-stone. The ordinances of the city not allowing unlicensed persons to occupy stalls, the City Inspector transferred the stall to Edward Costello, a butcher. The plaintiffs claiming to have acquired rights in the stall, brought a suit to restrain the City Inspector and the clerks of the market from interfering with the stall, and asked an injunction pending the suit.

HOFFMAN, J., said: "There are several interesting questions raised in this case, which I have to a considerable extent examined; but, finding two points on which I think the motion must be disposed of, I forbear to state my views upon the other points.

"The stall in question is in one of the public streets of the city. It is out of the power of the Corporation, even by the most solemn act of which it is capable, to confer upon any one a legal right to the use of it for a day. Such an act it might revoke at its pleasure; such a permit the Attorney-General, or perhaps adjacent owners showing special injury, might compel it to rescind, by compelling the removal—abating it as a nuisance."

The ruling in St. John *vs.* The Mayor, &c. (3 Bosw. Rep., 483, S. C.; 6 Duer R., 315), was then stated.

"It is urged with some force, that the Corporation and its officers ought not to be permitted to withdraw a permission once given to a party to use the shed or stall, however slight may be the tenure of that occupation, unless they discontinue that shed or stall altogether. It is unjust that they should take the use and enjoyment from one and give it to another.

The difficulty is, that from the incapacity of the Corporation or its officers to grant anything more, the occupation cannot be anything more than like a tenancy at will.

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The plaintiff was bound to know that all he acquired, or could acquire, was a privilege of such an extent and character merely. The Corporation could put an end to it when they chose; and the giving it to another, if an inequitable act, violated no legal right possessed by the plaintiff.

But if this view of the case is wrong, there is another, decisive against allowing an injunction. The legal right is at least very doubtful. There is no immediate, irremediable injury which will arise from refusing the injunction, while the legal right is in the course of judicial investigation and decision. If the plaintiff succeeds, he will obtain possession of the stall, and possibly have a perpetual injunction and damages, although ground for such seems scarcely laid in the complaint. At any rate, whether any right can be established or not, there is no case warranting an injunction. (Frederick *vs.* Meyer, 1 Bosw. R., 227.)

Add to this, that the affidavit of the officers of the Corporation show that nothing is threatened or intended, which can interfere with the due assertion of any right the plaintiff may possess.

The motion for an injunction must be denied, with ten dollars costs."

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CHAPTER IV.

RESTRICTIONS ON ALIENATION.

It was before noticed that the right of alienation of property vested by the charters, was expressly conferred by the charters; and that as to other property, the common law doctrine was that the power attached as a general incident of property.

There are restrictions upon this power—some, so to speak, self-imposed; others of express restraint or modification of the right of disposition; others arising from the character of the tenure.

First—*Sinking Fund Restriction.*

The system of creating a public debt, and providing a fund for its redemption, and the payment of the interest, commenced in a statute passed on the 8th of June, 1812.*

Prior to that time, bonds or obligations of the Corporation were issued to creditors, but only in discharge of debts incurred for lawful purposes of expenditure.

In that act it was recited, that the Mayor, Aldermen, &c., had stated in their memorial to the Legislature, that they had incurred great expenses in making numerous public improvements, beyond the amount of their annual income, and had issued their corporate bonds under seal, to defray such expenses; that they would be obliged to incur great cost in carrying out the plan of the commissioners for laying out streets, &c., and that they prayed the authority of the Legislature to permit them, by an act, to fund their present debt, and provide for future contingencies, by raising a stock or fund not to exceed $900,000.

* 6 Webster, 436.

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The first section provided that it should be lawful for the Mayor, Aldermen, &c., to create a public fund or stock, not exceeding $900,000, to be denominated "The New York City Stock." The first eight sections prescribed the mode of subscribing, issuing of certificates, and other details, not necessary to notice. The stock was made redeemable in fourteen years.

By the 9th section it was provided, "that the faith of the said The Mayor, Aldermen and Commonalty of the city of New York shall be pledged for the final redemption and payment of the stock which shall or may be created pursuant to the provisions of this act; and that all and singular the revenues of the Mayor, Aldermen and Commonalty shall be, and they are hereby, appropriated and pledged for the payment of the interest which shall become due on the said stock, and shall continue so pledged until the final redemption of the said stock; and that in case the said revenues be not sufficient to satisfy and pay the whole of the said interest, then and in that case the faith of the State shall be and is hereby pledged to pass such act or acts as shall from time to time be necessary, authorizing the Mayor, Recorder and Aldermen of the said city to raise by tax on the estates real and personal of the inhabitants and freeholders of and situate within such city, such sum and sums of money as shall and may be requisite to supply any and every such deficiency."

Immediately upon the passage of this act, and on the 29th of June, 1812, the Corporation passed an ordinance to the following effect:

"That the Finance Committee and Comptroller be authorized to publish such part of the act of the Legislature as by them should be deemed proper; that they should advertise for a subscription for $600,000 of the New York City Stock, and prescribing the mode and terms of subscription."

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The Comptroller, Thomas R. Mercein, made a report on the 19th of April, 1813, containing the first suggestion of the scheme, out of which the ordinances of the Corporation have arisen. It was referred to the Finance Committee.

On the 13th of August, 1813, an ordinance regulating the subject was adopted.

It recited, that it was highly desirable to establish a fund, out of which purchases of the New York City Stock may be made from time to time, whenever the same can be done at par, or the true value thereof; whereby the said stock will be prevented from depreciating, and the redemption of the same will be regularly progressing. Therefore it was ordained, "That all moneys heretofore received and hereafter to be received for commutation of quit-rents on grants issued prior to the year 1804; all quit-rents arising from such of said grants as shall not be commuted, and all moneys heretofore received and hereafter to be received for licenses to pawnbrokers, and dealers in the purchase or sale of second-hand furniture, metals, or clothes; for hackney coach licenses, and for street vaults—all market fees and market rents—twenty-five per cent. on all sales of real estate belonging to the Corporation, and hereafter to be sold—and all such other sources of revenue or sums of money as the said Corporation shall hereafter think proper to appropriate for that purpose, shall be, and hereby are, firmly pledged, appropriated, and applied to, and shall constitute and form the fund for the purpose aforesaid, until the final redemption of the whole of such stock."

By the 2d section, the Mayor, Recorder, Comptroller, and Treasurer of the city, with the chairman of the Finance Committee for the time being, were constituted a Board, to discharge the trust and duties imposed by the ordinance, to be denominated, "The Commissioners of the Sinking Fund for the Redemption of the New York City Stock."

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The other sections relate to the mode of discharging their duties.

A further act of the Legislature was passed on the 24th of March, 1820 (Sess. Laws, ch. 101). It authorized the creation of a public fund or stock, not exceeding $400,000 in addition to the sum authorized to be created by the act of June 8, 1812, to be denominated "The New York City Stock." All the provisions of that act, not otherwise provided for, were made applicable to the new loan; and there was this clause added: "*Provided*, that nothing herein contained shall be so construed as to deprive the holders of stock created by said act, of any lien which they are entitled to by said act, upon the revenues of the said Mayor, Aldermen, and Commonalty."

In the edition of the ordinances of 1817 and 1821, the provisions of that of 1813 were renewed, without material alteration.

Next followed a statute, of the 28th of March, 1826,* empowering the raising of a public stock or fund, not exceeding $700,000, in addition to the sums authorized by the two preceding acts, to be denominated by the same name. All the provisions of the act of 1812 were made applicable. The same proviso is contained in this statute; and by the second section, the Corporation was directed to apply the moneys so to be raised to the reimbursement of the moneys raised under the act of June 8th, 1812, and to no other purpose whatsoever.

In the revision of the ordinances of 1827, the provisions of that of 1813 were retained.

The moneys raised under the acts of 1812 and 1820 fell due in 1826.

Another statute was passed on the 19th of April, 1828,† empowering a further loan of $200,000, with similar provisions as are contained in the act of 1826.

* Sess. Laws, 1826, p. 76. † Ibid., p. 327.

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The ordinance approved February 11th, 1834, constituted the Mayor, Recorder, Comptroller, and Treasurer, with the Chairman of the Finance Committee of each Board, the Commissioners. The funds set apart were the same as in the ordinances of 1813 and 1817, except that the whole of the net proceeds of real estate belonging to the Corporation on the 1st of January, 1825, and thereafter to be sold, were pledged.

A special ordinance was passed on the 4th of March, 1834, by which the Commissioners of the Sinking Fund were authorized to invest so much of the balance of the fund standing to their credit, or which might thereafter stand to their credit, as might be necessary in the purchase of a piece of land, in the Eleventh Ward, between North and Second streets, and in the purchase of the land for the improving and extending the Grand street, Essex, and Centre Markets; and the whole of the rents, fees, and income of the said markets in their improved state, and the lands thus purchased, was thereby appropriated and pledged for the payment of the principal and interest of the sum that should be thus drawn from the said fund.

Again, by the 8th section of the act for supplying the city of New York with pure water, passed May 2, 1834,* the Common Council were empowered to raise by loan, from time to time, a sum not exceeding two million five hundred thousand dollars, by the erection of a public fund, or stock, to be called "The Water Stock of the City of New York," redeemable at not less than ten nor more than fifty years from the passage of the act, and by the tenth section of that act the provisions of the act of June 8th, 1812, which are not repugnant to or incompatible with any provision in that act contained, shall apply to the said stock.

* Session Laws, 1834, p. 452.

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The moneys to be raised were to be applied for the purpose of supplying the city with water, according to the plan adopted.

In the revision of the ordinances of 1839, there was no material variation from the ordinances of 1834. As to the real estate, however, the law appropriated (§ 6) the net proceeds of all sales of real estate which belonged to the Corporation on the 1st of June, 1825, and sold since that date, or thereafter to be sold; and also (§ 7) twenty-five per cent. on the net proceeds of all sales of real estate belonging to the Corporation on the 5th of May, 1817, and sold before the 1st of January, 1825.

The ordinances upon this subject, with some additional provisions, were revised and re-enacted on the 22d of February, 1844. It will be useful to advert to the report of the Finance Committee of both Boards, of December 29th, 1843, to show the views of the Common Council upon the matter. They observe, that the existing ordinances provide only for the administration of the fund when it came into the hands of the Commissioners. The proposed ordinance, in addition to this, is intended to establish a permanent policy in the management and sale of the property of the city pledged for the sinking fund. That the object to which the fund was to be devoted was twofold—the liquidation of the principal, and payment of the interest as it accrued. That the revenues had been sufficient until the creation of the water debt; and thereupon the Legislature, in conformity with its pledge, passed a permanent law for the levying of this deficiency annually. That the Corporation had never passed in the form of an ordinance a provision in conformity with the State pledge; and this was proposed in the ordinance then submitted.*

* Doc. Board of Aldermen, vol. 10, p. 583.

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The clauses of the ordinance of February, 1844, so far as the subject of real estate is concerned, are as follows:

"All money heretofore received, or hereafter to be received, from the following sources, are hereby pledged, appropriated to, and constitute and form a fund, called 'The Sinking Fund of the City of New York for the Redemption of the City Debt,' until the whole of the stocks of the city of New York shall be finally and fully redeemed:

1. For commutation of quit-rents on grants.

2. For quit-rents arising from such grants as were issued prior to the year 1804.

3. The net proceeds of all real estate belonging to the Corporation when sold.

10. The buildings included in the establishment called The Alms-house, at Bellevue, together with the lots of land and water rights attached thereto when sold; and the rents thereof when leased."

And the 2d title provides for payment of the interest as follows:

"All moneys hereafter to be received from the following sources are pledged, appropriated, and constitute, and form a fund to be called 'The Sinking Fund of the City of New York,' for the payment of the interest upon the stocks, until finally redeemed. Among the sources pledged are 'all rents from all sources not already pledged.'"

By the 10th section, nothing in the ordinance shall be so construed as to impair or affect any pledge heretofore made and now existing, of any property, or its proceeds, embraced in this and the preceding title.

The 4th title of this ordinance is "of the disposition of real estate." Various offices are here assigned to the Comptroller; and the powers which he is to exercise in conjunction with or under the sanction of the Commissioners of the Sinking Fund, are specified in the fifth, sixth,

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tenth, and eleventh sections, with certain restrictions on the power of the Commissioners as to water grants, more particularly noticed under the proper heads. It may be sufficient here to observe, that every material power of control, leasing for one or more years, and of disposition, was placed in them.

Then follows the important seventeenth section, as follows: "The Commissioners of the Sinking Fund are hereby authorized to sell and dispose of all real estate belonging to the Corporation, and not in use for or reserved for public purposes, at public auction, at such times and on such terms as they may deem most advantageous for the public interest; provided, however, that no property shall be disposed of for a smaller sum than that affixed to the description of such property, under title fifth of this ordinance; and that at least twenty days' previous notice of the time and place of such sale, including a description of the property to be sold, be published in each of the newspapers employed by the Corporation."

The fifth title establishes a rate of valuation at which the property may be sold.

By the 4th section of this title, it is made the duty of the Commissioners to give a certificate of sale, and upon this, and proof of payment into the treasury, it is made the duty of the Mayor, Aldermen, &c., to execute conveyances to the purchasers.

On the 13th of May, 1845, an act was passed creating a public fund or stock in the city of New York, to be called "The Croton Water Stock," and in relation to the "Sinking Fund."

The first two sections authorized the creation of the stock. The third made the provisions of the act of June 8, 1812, applicable, except where repugnant to the present act. And the fifth section is as follows: "The ordinance

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now in force, and approved of by the Mayor of the city on the 22d of February, 1844, and any ordinance that may hereafter be passed by the said Mayor, Aldermen, and Commonalty, in conformity with the provisions of this law, and relative to the said sinking fund, shall not be amended, without the consent of the Legislature first had and obtained, except by setting apart and appropriating, to and for the purpose of the said sinking fund, additional revenue, whenever the said the Mayor, Aldermen, and Commonalty shall deem proper; and the said ordinance shall remain in full force until the whole of the debt created for the introduction of the Croton water into the city of New York shall be fully redeemed."

Another statute, passed on the 12th of March, 1849, authorized a loan of $600,000, by the creation of a public fund, to be called "The Water Stock of the City of New York, for the year 1849;" and the 3d section provided, that all the provisions of the law theretofore passed, pledging the faith of the city of New York, and providing a sinking fund, should be applicable to that loan.

Again, an act of the 20th of June, 1851, authorized the creation of a public fund, to be called The Croton Water Stock of the City of New York. It was directed that the provisions of the act to regulate the finances of the city, passed June 8, 1812, not repugnant to that act, should apply to the loan; and by the fifth section, the ordinance of the 22d of February, 1844, and any other ordinance which might be passed in pursuance of the law then passed, and relating to the Sinking Fund, should not be altered without the assent of the Legislature, except for appropriating additional revenue; and such ordinance shall remain in force until the whole of the debt created by virtue of the act for creating the Croton Water Stock, and in relation to the Sinking Fund, passed May 13, 1845, and by virtue of this act, shall be fully redeemed.

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Other statutes than those above cited have from time to time been passed, which are connected with this subject, but they are not necessary to be stated in order to understand the matter now discussed.*

The first observation which occurs upon this series of statutes and corporate acts is, that the Legislature, from the beginning, have made it a virtual condition of the grant of the power to raise the loans, that they should be secured by a pledge and appropriation of the revenues of the city.

The Corporation, in applying for the acts, and in accepting them, acceded to this condition, and came under an obligation to fulfill it. That duty was performed by the ordinance of August 9th, 1813, and those subsequently passed to the like effect.

The absolute requisition of the statute of 1812, so often re-enacted, was only for a pledge of the revenue to meet the interest to accrue on the loans. As to the principal, the faith of the Corporation was pledged to provide for its redemption.

But the Common Council made the pledge of certain property for securing the redemption of the whole debt in the early ordinances; and in 1845, for the first time, distinguished and separated certain funds to meet the interest from those to meet the principal.

So long as the funds set apart to pay the interest were adequate, the statute was probably substantially complied with, although the whole revenue was not literally set apart.

It can scarcely be doubted, that a lien was established upon the appropriated funds and property, by these acts of the Legislature and of the Corporation. The language of the proviso in the successive statutes after 1812, as to the

* They may be found adverted to in the edition of the ordinances of 1845.

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rights of prior lenders under that first act, presupposes this; and the pledge in the ordinances is specific and explicit.

I should think also that a priority of lien existed in all lenders under the first act. That loan, however, being extinguished, the question would not arise. It may also be case, that such priority exists under the subsequent statutes, according to the date of the loans.

In what manner, or in what cases, such a lien could be enforced, need not be discussed. The case has not arisen, and is not now to be anticipated. It suffices to say, that, in the author's opinion, if the interest on one of these loans was unpaid, and a case was made out that the deficiency arose from an appropriation of the funds to other purposes, an injunction against such application could be had, and a decree for the proper appropriation.

Again, the condition, which in the early acts was only imposed in relation to the interest, was extended in the statute of 1845, and the acts passed subsequently, to the principal. And this condition is a stipulation demanded by the Legislature, acceded to by the Corporation, and an essential element of the contract with each stockholder.

Board of Commissioners.

But next, the Corporation, in performing with fidelity the condition imposed by the Legislature, and its plighted faith to the subscribers to these stocks, went further, and constituted a distinct board or agency for carrying out these objects.

Accordingly, by the ordinance of August, 1813, the Mayor, Recorder, Comptroller and Treasurer of the city, with the chairman of the Finance Committee for the time being, were constituted and denominated "The Commissioners of the Sinking Fund for the Redemption of the New York City Stock," and their powers and duties were declared.

Passing over the intermediate ordinances, we find, that in 1845, the officers who are to form the Board of Com-

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missioners are, the Mayor, Recorder, Comptroller, and Treasurer of the city, and the chairman of the Finance Committee of the Board of Aldermen, and the chairman of the Finance Committee of the Board of Assistants.

All these officers continue to exist under the charter of 1849.

The powers conferred upon the Commissioners, so far as they concern real estate or interests, are the following:

The Comptroller, under their sanction, is to appoint appraisers to settle the rent on renewal of leases, or the value of buildings on the expiration of leases then to be paid for. (§ 5.)

With the like sanction, the Comptroller may assign bonds and mortgages belonging to the fund. (§ 6.)

The Comptroller, with the approval of the Finance Committees, may let unproductive property belonging to the Corporation, for a term not exceeding one year (§ 9); but no lease can be granted for a longer term, without the concurrence of the Commissioners. The lease, however, cannot be for a longer term than five years, and must be submitted to the Common Council for their sanction.

Grants of land under water on the shores of Long Island or of New York, and extensions of grants, are placed under their control, as to the sum to be charged and other terms. (§ 11.)

This is qualified, however, as to rates to be charged for grants on the North River, between Hammond and Thirtieth street; which are prescribed in the ordinance. (§ 12.)

Another qualification is found in the fifteenth section, which forbids any grantees under the ordinance from building piers or bulkheads, or making land in conformity thereto, without the permission of the Common Council.

Thus is established a very rigid restriction upon the power of the Common Council over its real estate, pledged

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for the purposes before stated. All the power which is not reserved to the Common Council, and is delegated to the Commissioners, is vested in them exclusively. There cannot be a concurrent authority over the same subject.

I cannot then understand the ground on which the Committee of Finance of the Board of Alderman acted in a report made by them on the 9th of December, 1851. They reported a resolution that the Comptroller execute a lease to R. C., of the water front below high water on the North river, from Thirty-fourth street to Thirty-seventh street, for the term of ten years from January 1, 1852, at the annual rent of $1,000, with a provision, however, that if any part of the property was granted by the Commissioners of the Sinking Fund, the lessee should relinquish possession of the same, and a *pro rata* portion of the rent should be allowed him. I should have supposed that the assent of the Commissioners was necessary to such a lease.

Martin *vs.* The Mayor, &c.

Since the preceding part of these observations has been prepared, the case of Martin *vs.* The Mayor, &c., and the Commissioners of the Sinking Fund, has occurred.

The Commissioners of the Sinking Fund advertised various lots of ground and certain wharves and piers to be sold, under the authority of the ordinance and statute. A resolution was then passed through both Boards of the Common Council, requiring that the sale be postponed. This was, however, vetoed by the Mayor. His message is to be found in the proceedings of the Board of Aldermen, December, 1852. An application was then made to the Superior Court, for an injunction staying the sale, and a temporary order was granted.

The complaint raised the following points:

1. That the ordinance allowing an absolute sale of the real estate was void; that the property must remain in *specie* to meet the interest from its income; or at least that

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it could only be sold as the principal became due. That by selling and converting the property into money, and investing the proceeds, the security was diminished in value—the income now being less than what was yielded, or would be hereafter yielded, from the growth in value of such property; and this impaired the obligation of the contract created under the statutes.

2. That if the ordinance of 1844, and act of 1845, were legal, yet the effect of the amended charter of the 1st of June, 1849, placing all the fiscal concerns of the city under the control of the Department of Finance, subject to the control of the Common Council, abrogated and superseded the ordinance and statute.

3. That it was injurious and inexpedient to sell the property at the present time, for various reasons set forth in the complaint.

This complaint, it should be noticed, was filed by an individual styling himself as an inhabitant, freeholder and tax-payer within the city of New York. No holder of a Corporation obligation under either of the different statutes was a party.

An injunction, prohibiting the sale of the lots, piers and bulkheads advertised, was granted by Judge Emmet, of the Superior Court.

His Honor laid down these positions:

1st. That the statute of 1812 (and the subsequent statutes) did not create any such lien in favor of the holders of the stock, as could operate to deprive the Corporation of the right of selling and disposing of the property as they should think proper.

2d. That the ordinance of February, 1844, was valid. The Corporation was under no legal disability to sell any of the city property, whenever they thought fit to do so, and could lawfully exercise that power in the manner adopted in the ordinance.

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3d. But that this ordinance was revocable at the pleasure of the Corporation; that any future Common Council could alter, modify or repeal it, and any Legislature could assent to any such modification or repeal.

4th. And that the provisions of the new charter of 1849 did operate as a repeal of that part of the ordinance which created Commissioners of the Sinking Fund, or conferred powers upon them in relation to the property or debts of the city. In creating a department with the entire control of the fiscal concerns of the city, with all the provisions regarding such department and its powers, the ordinance was so far at least superseded.

5th. That as to wharves, piers and bulkheads, they fell within the implied exception in the 17th section of the 4th title; that they were in use for public purposes.

It will be observed that the learned Judge does not intimate, even, that the ordinance of 1844, so far as it makes a pledge or an appropriation of property for the payment of the stockholders, was in the least affected by the amended charter. On the contrary, he recognizes the validity of the whole ordinance when passed, and denies only the validity of that branch of it as to the power of the Commissioners after the adoption of the charter. I also understand the Judge to hold that the lien or pledge, whatsoever it was, which attached to the property at the date of the respective statutes, remained precisely the same, after the conversion by a sale, as it was before. He distinctly holds that the right to convert it was unimpaired; and in confirmation of this view, we may notice that the proceeds and moneys received from the property pledged are to be invested in the purchase of any city stock, if it can be done at par, and the interest on that stock is to be carried to the credit of the Sinking Fund, until a final redemption of the stock. Many provisions prove the intention to pre-

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serve the substituted proceeds precisely in the situation of the original property. The right to take advantage of opportunities for a beneficial sale was certainly not abridged.

But with respect to the abrogating effect of the charter of June, 1849, the author, with the utmost respect to a Judge so long and fully conversant with the powers of the Corporation, cannot but submit some reasons for differing.

First. There was, in the pledge and appropriation of the property specified in the ordinance of 1844, a trust created. Without specifying all the beneficiaries, or those entitled under it, it is clear that the holders of all the city stock, raised under the statutes containing an adoption of, or reference to, the ordinance of 1844, were such. The constitution of the Board of Trustees was as explicitly made as the creation of the trust itself. That body was made wholly independent of the Common Council. It may no doubt be that, with the consent of the Legislature, other officers or persons might be selected for the duties. The name might be changed. But any law which abrogated all trusteeship—left no one to exercise the powers or assert the rights delegated or conferred in the ordinance, and restored the property to the control of the Corporation, was as much a violation of the contract as the annulment of the pledge itself. It would be the same as after creating a trust, and constituting trustees with a settled mode of continuance, to then attempt the destruction of the trusteeship, and to make the creators of the trust the nominal trustees for the future.

I apprehend, therefore, that if the charter of 1849 had in terms abolished the office of Commissioners of the Sinking Fund, without providing a similar distinct body vested with the same power, it would have been void and unconstitutional.

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Second. But I submit that there is no necessary repugnance or incompatibility between the charter and the ordinance.

1st. If a consistent construction can be found, it is to be adopted.

2d. The Common Council supposed there was no inconsistency. In the organization of the departments under the statute, they recognize the existence of the Commissioners. This is done in section 105, in section 130, and in section 149.

3d. The Common Council applied for an act for a further loan, which was passed on the 13th of March, 1849, and the charter passed on the 2d of April, 1849. It had been approved by the Common Council, in January, 1849. This act of March refers to and adopts the ordinance. The two acts were therefore most simultaneous, and any supposition of any inconsistency being seen or intended, is disproved.

4th. The Corporation and Legislature, in the statute passed on the 20th of June, 1851, distinctly recognize the whole ordinance as in full force.

5th. Under the charter of 1830, and by the 21st section, it was directed that the executive business of the Corporation should thereafter be conducted by distinct departments, which it should be the duty of the Common Council to organize and appoint for that purpose.

An ordinance passed, that there should be an Executive Department, under the denomination of "The Department of Finance." The Comptroller, as one of its officers, was to superintend all the fiscal concerns of the Corporation, and his powers were as comprehensive and extensive under this organization, as under the charter of 1849. So as to the other officers in that department. In fact, these clauses of the charter are almost literal re-enactments of the sections of the old ordinance.

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The language there used by the Legislature in one case, must be treated as used in the same sense as the language of the Corporation in the other; and if the constitution of this Board of Trustees was consistent and valid in the one instance, it will not be different in the other.

6th. If the charter of 1849 could be deemed to have superseded the office of Commissioners, the statute of 20th of June, 1851, restored it. We need not now inquire whether it revived the ordinance and the Commissioners' rights, merely as to the fund then authorized, or as to all the particular funds, and entirely. But the Legislature and Common Council did, to some extent at any rate, renew the ordinance and every part of it in full force.

Yet this is not the ground upon which, in my judgment, the question should be rested. It might be of moment in the present suit before the court; but in supposing a restoration by legislative power with the Corporation's assent, the right to abolish the office may be supposed; and hence the power of hereafter rescinding the restoring act be admitted. The great and tenable ground is, that there was a trust created, under which money was loaned upon the plighted faith of the city; that trustees were appointed for the conservation and execution of that trust, and that the extinction of their office without substituting another class equally distinct and with equal powers, is as plainly to impair the inviolability of the contract, as it would be to destroy the pledge itself.

Upon this subject the following case may be usefully referred to:

The Board of Liquidators of the City Debt *vs.* Municipality, No. I., vol. 6, Louisiana Rep., 21.

By an act of the Legislature of the 6th of May, 1847, the Municipality of the city was authorized to fund its debt, and issue bonds for the amount; and to secure their

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redemption a certain portion of the annual income of the city was pledged, to be deposited in the Bank of Louisiana, and appropriated as therein directed.

A subsequent statute of 1850 transferred all these funds to the separate municipalities, with directions to sell the property and pay the debts.

This statute was held unconstitutional. It impaired a contract with the creditors. They had a right to the security as originally provided, and a right to have the depository of the funds continued.

The argument of the court is a very clear and able one.

In the case of The People *vs.* Wood and others, Commissioners of the Sinking Fund, connected with a disposition of the property of the Presbyterian Church, commonly called the Brick Church, Mr. Justice Duer, before whom the case was heard, requested the author to sit with him. An opinion, of which the following is a part, was prepared and agreed upon. The question, afterwards decided by the Supreme Court, as to a resolution of one Board in one year being adopted by the other in the next year, was suggested by the author, and a request to have it argued was made to counsel. In the mean time some other course was pursued, and a decision in the Superior Court was not called for.

The opinion was as follows:

"The ordinance of 1844 was recognized and embodied in the statute of 1845; and the Corporation, by accepting and acting upon that statute, rendered the provisions of the ordinance immutable, without the consent of the Legislature."

"Thus the exercise of the common law right of disposition, which attached to any property owned by the city, or which was conferred by the charters, was taken away, or restricted as to every parcel of property transferred to, or

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placed under the control of the body, constituted to carry out this system of pledge and appropriation. That body was the Commissioners of the Sinking Fund."

"Among the property thus appropriated, was the following:

1st. All moneys arising from the commutation of quit-rents or grants.

2d. Quit-rents arising from such grants as were issued prior to the year 1804.

3d. The net proceeds of all real estate belonging to the Corporation when sold.

By the 11th section of the ordinance, it is provided, that the revenue therein assigned for the redemption of the city debt shall be kept distinct from all other revenues belonging to the Commissioners.

By the 8th section of title 4, whenever any person may desire to commute any quit-rent due the Corporation, the Comptroller is to calculate such commutation at the rate of six per cent.; and upon a certificate of the amount being paid into the Treasury, the Mayor and Clerk are to execute a release of such quit-rent.

And by the 17th section of title 4, the Commissioners were authorized to sell and dispose of all real estate belonging to the Corporation, and not in use for or reserved for public purposes, at public auction, in the manner directed, and after the appraisement prescribed, in section 3 of title 5.

And by the 4th section of title 5, whenever any real estate shall have been sold pursuant to the preceding section, upon a certificate given by the Commissioners to the effect prescribed, the Mayor and the Clerk of the Common Council are to execute proper conveyances, under the seal of the city.

The theory of these provisions is, an assignment of

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the rents,—an equitable transfer of the commutation money for such rents, and of the proceeds of real estate—coupled with a power of commutation in one case, and of sale in the other. In addition, there is a right to call upon the Mayor and Clerk to perfect the release of the quit-rents, or the title to the real estate, by proper instruments. And no doubt the commuter or the purchaser would have a right to enforce the same in a proper case. In these instances, the legal power to extinguish the rent, and the legal title to the real estate, continued in the Corporation.

The character of the several rights and interests thus reserved to the Corporation is next to be considered in connection with this case; and *first*, in respect of the rents, and *next* of the other reservations or rights.

II. 1st. The deed of 1766 was a grant in fee, reserving or paying an annual rent to the Mayor, Aldermen, and Commonalty, for the time being. Such a reservation of rent has acquired in our State the name of quit-rent. It is supposed to have originated in the rents reserved in patents granted by the colonial government. In the commission to Governor Osborne, we find the phrase employed in empowering him to grant lands, upon such terms, and under such moderate *quit-rents*, services, and acknowledgments, as he, with the advice of the Council, should see fit. (Smith's History New York, 235 ; 2 R. S. 1813, 175.) Blackstone, however, mentions quit-rents as a species of rent so termed from being in lieu of all other services, the lessee being thus quieted in his term. (2 Blacks. Comm., p. 41.)

The technical description of a rent, thus reserved, was a fee farm rent—a perpetual rent reserved in a conveyance of a fee simple. (3 Cruise, 28, c. 1, § 13; Smith on Real Property, p. 11 ; Law Library, vol. 89, p. 51.) It con-

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stituted an inheritable estate, (Scott *vs.* Lent, 7 Peters' U. S. Rep., 59 ; Watkins on Descents, 290,) and has been termed an incorporeal hereditament. (2 Blackstone, 42.)

2d. This interest was assignable, and was sufficiently transferred by the ordinance to the Commissioners of the Sinking Fund. This proposition does not admit of dispute, and, I believe, has not been contested. But it was a right (and an irrevocable right, without the assent of the Legislature to a revocation) to receive the current rents. It was accompanied with a right to the redemption money, payable on a commutation ; but the right to extinguish the rent by a release was reserved to the Corporation, and was not by express permission, or possible implication, given to the Commissioners. It may also be assumed, that a right of action passed to the Commissioners to sue for the rent in their own name, either before or since the Code. Had there been a covenant to pay rent, this would have been clear.

In the case of Havergill *vs.* Hare (Croke James, p. 510), *A*, seized in fee, granted a fee farm rent to *B*, with a clause of distress, and a covenant to levy a fine, to uses for securing payment of the rent; so that, if it should be in arrear, *B*, his heirs and assigns, might enter and enjoy the rents until his arrears were paid. *B* assigned the rents to C, "with all the penalties, forfeitures, profits, and advantages in the said indentures contained." The judges resolved, that it, being matter of inheritance, and being for security for the payment of the rent, and waiting upon the rent, might well be transferred with the rent ; and by the grant of the rent, the penalty well passed. But if it had been a mere possibility, not coupled with another estate, then it had not passed.

In Scott *vs.* Lent (7 Peters' U. S. Rep., 602), the action was covenant under a lease for recovery of rent reserved.

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General Washington had granted to Ezra Lent, his heirs and assigns, a parcel of land, yielding and paying to him and his assigns $73 annually. There was a covenant to pay the rent reserved, with a further covenant that, upon default, the lessor, his heirs and assigns, might enter upon the premises, and make distress, to satisfy the rent. And by another clause, if no sufficient distress should be found upon the premises, he, or they, might re-enter, and hold the premises, as if the indenture had never been made.

By an assignment executed under a power in General Washington's will, there was assigned and granted unto Henry Turner, his heirs and assigns, "the aforesaid annual rent issuing out of and charged on the aforesaid piece or parcel of ground hereinbefore described." There were no words transferring any of the rights or remedies, reserved in the original grant.

The plaintiff claimed under an assignment from Turner.

It was held that the assignment of the rent, without a grant of the reversion, was valid, and passed it. That the case from Croke James settled, that a transfer of rents would operate to transfer all attendant remedies to enforce payment, if apt words were used to effect such transfer. That the fee farm rent was an estate of inheritance; and that upon principles of the common law, the assignee of the rent was, without more, entitled to sue in his own name, to recover the amount.

Whether the plaintiff had any right of re-entry was a very different question.

(See further Depeyster *vs.* Michael, 2 Selden, 506.)

3d. I apprehend, also, that the right to enter upon the premises, for breach of a condition to pay rents, will pass to an assignee or grantee of rents reserved in a grant in fee, without more than an absolute assignment and transfer of such rents.

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The statute of Henry VIII., cap. 34, the influence of which is felt to this day, provided, that, in case of demises and grants of lands, &c., for term of life or lives, or for term of years, where conditions or covenants were to be performed by the lessees and grantees, every person or persons who shall have any gift or grant of any manors, lands, tenements, rents, tithes, portions, or any other hereditaments, and all other persons, being grantees or assignees, as well of the King as of any other person or persons, and their heirs, executors, successors, and assigns, shall have and enjoy the like advantages against the lessees, their executors and assigns, *by entry for non-payment of the rent, or for doing of waste or other forfeiture; and also* shall have such like benefit and advantage, and *remedies, by action only*, for not performing other conditions, covenants, or agreements in such leases or grants contained, as the lessors or grantors themselves, or their heirs or successors, might have had or enjoyed, at any time or times. (Statutes at Large, Vol. 2, p. 294.)

The preamble, the enacting words, and the received construction, applied these provisions to grantees of the reversion, and to none others. (Plowden, 175; 3 Coke, 62.)

The statute of our State of the 6th of February, 1788, expressly provided for the case of persons having manors, lands, tenements, rents, or other hereditaments, or any reversion of the same; and they may have the like advantages against the lessees, their assigns, &c., by *entry*, for the non-payment of the rent, or for doing of waste, or other forfeiture. *And also* shall have and enjoy all and every other like benefit, and remedy, *by action only*, for not performing other conditions, covenants, and agreements, contained in such leases or grants against the termors or grantees, as the lessors and grantors themselves might have had or enjoyed, in like manner as if the reversion of

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such lands, tenements, or hereditaments had continued in such lessors or grantors, or in their heirs or successors. (2 Greenleaf, 13.)

The first section of the law of 1813 (1 R. S., p. 363) re-enacted the law of 1788, precisely in the same words; but the third section of the act contained this provision: "That all the provisions of the act, and all the remedies thereby given, should be construed to extend as well to grants or leases in fee, reserving rents, as to leases for life or years."

This section was first enacted in the law of April 9, 1805 (4 Webster, 254, Sess. 28, cap. 98.) The recital of that statute is instructive. "*Whereas*, it has been doubted whether the provisions of the act hereby amended, extend to any but assignees of reversions, dependent upon estates for life or years; and whereas, leases or grants in fee, reserving rents, have long since been in use in this State; therefore," &c., enacting the third section of the act of 1813.

The Revised Statutes of the year 1830 followed in the path of the law of the year 1540, and re-enacted the provisions stated, but in a condensed form, and omitted one phrase, which deserves attention. (1 R. S., 747, 748.)

The twenty-third section is: The grantees of any demised lands, tenements, rents, or other hereditaments, or of the reversion thereof, the assignees of the lessor of any demise, and the heirs and personal representatives of the lessor, grantee, or assignee, shall have the same remedies, by entry, action, or otherwise, for the non-performance of any agreement contained in the lease so assigned, or for the recovery of any rent, or for the doing of any waste, or other cause of forfeiture, as their grantor or lessor had, or might have had, *if such reversion had remained in such lessor or grantor.*

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The twenty-fifth section of this act is a re-enactment of the third section of the act of 1813, that the two previous sections are to extend to grants or leases in fee, reserving rents.

In Nicholl *vs.* The New York and Erie Railroad (2 Kernan, 132), the Court say: "In the case of a grant or lease in fee, though the grantor has no reversion, he has an interest by way of annual rent reserved; and in cases of leases for lives or years, he has an actual reversion. In these cases he has, then, a vested interest, and may well be permitted to assign with it his right of entry for non-performance of a condition subsequent; for the right to enforce a forfeiture is necessary to the collection of the rents, and to the protection of the reversion."

The right of entry, then, for non-payment of rent, may be considered as having passed to the Commissioners by the assignment, if we treat the ordinance as virtually containing an assignment.

4th. But, in my opinion, a naked assignment of the rights reserved in a grant in fee could not pass a right to take advantage of the breath of other and distinct conditions, not connected with the recovery of such rents, or the preservation of the estate.

The statute of Henry VIII. has always been construed, as not extending to grantees of the reversion any conditions, or incidents to their breach, unless they were connected with the recovery of the rent, or benefit of the estate, such as covenants as to waste. (2 Cruise, 13, cap. 2, §§ 48, 49; Coke Litt., 214 *a*, 215 *b*; 1 Preston's Sheph. Touchstone, 140; Burton on Real Property, § 856; Comyns' Digest, *Condition* O, 2; 1 Saunders, 260.)

I content myself with quoting the language of the *Touchstone*, to illustrate the rule: "Albeit the words of the statute be general, yet grantees and assignees shall not

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take benefit of every forfeiture by force of a condition, nor yet of all conditions, but only of such as are inherent; *id est*, such as are either incident to the reversion, as for payment of rent, or for the benefit of the estate, as for restraining of waste, for causing of reparations, making of fences, preserving of woods, and the like. And of conditions that are collateral, such grantees shall not take benefit. And therefore, if the condition be for payment of a sum in gross, to *restrain alienation*, &c., the grantee of the reversion of the land shall not have advantage of it by this statute, for these remain as they were before the statute at common law."

The statute of 1788 and that of 1813 are identical with that of Henry VIII., in every particular material to the present question. The act of 1830 condenses the provisions of these statutes, and leaves out the clause as to benefits and remedies *by action only*, as to the other conditions and covenants in a grant, besides those applicable to rent or waste.

The question has then occurred to me, whether this omission can be sufficient to overthrow the construction which the statute of Henry VIII. had received for nearly three hundred years. I think it is not sufficient.

The revisers say in their notes, "That the sections 23, 24, 25 are new in form, but intended to include all the various provisions of the act to enable grantees of reversions to take advantage of the conditions to be performed by lessees" (R. S., p. 363).

The 25th section certainly admits the construction, that when a fee farm rent is granted to another, the remedies incident to the extent and nature of the grant shall pass, and not any others. The grantor of the rent, granting it by words passing that, and that alone, cannot be supposed (upon any legal principle of which I am aware) to depart

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with other rights or advantages totally inapplicable to the interest he grants.

Numerous cases hold that the terms of an assignment or release are properly limited to the transfer or release of what the party then possessed, was vested with, or entitled to. (Cases cited in Varick *vs.* Edwards, 5 Denio 664; Pope *vs.* Whitcomb, 3 Russell, 119.) Now, a right of re-entry for condition broken, unless it attach to the rent and follow as its attendant, is neither an estate, an interest, nor even a possibility of reverter, according to the case of Depeyster *vs.* Michael. That case is reported in 2d Selden's Reports, 468, and the opinion of Judge Ruggles is one which is destined to govern all similar questions, whenever they arise in this State. The decision is, of course, law, and was unanimous. The learning and ability with which the points are discussed will extend the influence of the opinion far beyond the decision. He says: "The right of re-entry for non-payment of rent, or the non-performance of other covenants, is not such an interest in the estate as makes the condition in question valid (the quarter sales reservation, as they were termed.) It is not a reversion, nor is it the possibility of a reversion; nor is it any estate in the land. It is a mere right or *chose in action;* and if enforced, the grantor would be in by forfeiture of the condition, and not by a reverter. At common law, a right of entry, being a mere right of action, could not be granted over. It is only by statute that the assignee of the lessor can enter for condition broken."

Now, the 23d section of the present act, in terms, and by long construction of the same provisions, applies to grantees or assignees of a reversion proper, viz.: attendant upon an estate for life or years; and I see no reason to doubt, that it would receive the same construction as the previous statutes, as to the character of the rights which

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pass. In Harbeck *vs.* Sylvester, 13 Wendell, 609, Ch. Justice Savage says: "He could not see any difference, or that any greater rights are conferred by the Revised Statutes, than by the Revised Laws."

I may present a summary of the present case, in the view now considered, in this form. The owner of the land conveys it in fee, reserving a fee farm rent. He grants the enjoyment of that rent to another; and also the proceeds of the rent if sold, or the redemption money, if the lessee commutes, by paying the capital which will meet it. But he does not grant the right to commute, nor to sell or transfer. That owner had also reserved to himself and his heirs, (successors is the same in principle,) a right to re-enter, if the property were appropriated or converted to other uses than such as were defined in the conveyance. Could such a right pass by such an appropriation of current rents, and eventual proceeds? I confess, the proposition seems to me not merely untenable, but absurd. The mind of every sound lawyer of the olden age would be shocked at its statement. Nor is there any incompatibility in holding that such a right continued in the Corporation, while the right to the rents passed to the Commissioners. It is not unlike the case stated by Littleton, and much discussed by the elementary writers. A feoffment was made by A to B, reserving rent payable to C, with a condition, that if it should be unpaid, the grantor A, his heirs, &c., might re-enter. It was considered that this was not a rent of any description, but yet a sum payable in gross. Payment to C fulfilled the condition, though he could not bring *assise*, and had no relief except in equity. The re-entry by A would avoid all his right to the rents. But before that, the feoffee was bound to seek him to make payment. (Littleton's Tenures, section 345; Coke upon Littleton, B. 2, 231, *a;* Gilbert on

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Rents, p. 56; Shephard's Touchstone, by Preston, p. 127).

There was also the case at common law of lord and tenant by fealty and rent, and a grant of the fealty. By this, the rent became extinguished. The lord's grant was an acknowledgment that the land was held of the grantee; and the tenure and fealty, being disunited from the rent, changed it from a rent service. (4 Coke, 9, *b*; Gilbert on Rents, 112.)

My conclusion is, therefore, that the right of re-entry for condition broken, or for any prohibited conversion of the property, did not pass to the Commissioners of the Sinking Fund under the assignment of the quit-rents, or their avails, as made by the ordinance.

II. The next question is, Did the right to re-enter, upon the breach of the other conditions in the grant, pass to the Commissioners under the clauses respecting the real property?

We are to notice that the ordinance grants to the Commissioners the proceeds of all real property when sold; a naked power of sale; and a right to call upon the Corporation to consummate such sale by the execution of conveyances.

The condition in question is, that if the parties shall, at any time thereafter, appropriate, apply, or convert the premises to private secular uses, then it shall be lawful for the Mayor, &c., their successors and assigns, to re-enter, &c.

Even if we could consider this agreement to convey upon a sale, and the appropriation of the proceeds, as a conveyance, could the right in question possibly have passed?

I have examined the following cases: Nicholls *vs.* The Erie Railroad Company; 12 Barbour Rep., 460, S. C.; 2 Kernan, 121; the late case of Underhill *vs.* The Saratoga and Washington Railroad Company (20 Barbour, 456); Varick

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vs. Edwards (1 Hoffman's Rep., 381 ; 11 Paige, 289 ; and 5 Denio, 664) ; with the other cases which were under the Eden Will, and De Peyster *vs.* Michael, 2 Selden, 468.

The exact decision in the case of Nicholls was this : a conveyance was made to a railroad company, in fee ; a condition was contained in the deed, that the road was to be constructed within a limited time referred to ; the condition was held to be a subsequent condition, and the right to enter upon its breach could not be granted to another ; did not follow and accompany a grant of the land made subsequently.

I had entered fully into the examination of the cases above cited, and the points discussed and decided. But it appears to me unnecessary to state them in detail. The proposition deducible from them is this : that the right to re-enter, upon the breach of the condition as to the appropriation of the property, could not have passed to a stranger, either by the most absolute conveyance of the whole estate, right, title, and interest of the Corporation, or by words expressly adapted and purporting to pass such right. This result appears to me so palpable, that no argument or citation is necessary to sustain it, and no reasoning can weaken it.

III. The next inquiry is, Has the Common Council transferred, or agreed to transfer, the right in question ?

The legal method of extinguishing or surrendering such a right is by release, confirmation, or estoppel. Where it has been created by feofment, it might have been extinguished by an absolute feofment to the feoffee, or another, or by fine. (Touchstone, 158 ; Lord Cromwell's case, Coke, 259 ; Coke Litt., 205, 209.)

So by a confirmation of the estate of the feoffee, without condition or a direct release to him, the condition is gone. (Perkins, sec. 822 ; Coke, 4, 119.)

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The trustees of the church obtained an order from the Supreme Court, on the 15th day of February, 1853, authorizing them to sell the property at public or private sale, subject to the conditions and restrictions contained in the grant under which they hold the same. On the 5th of May, 1854, the Board of Aldermen passed a resolution that (the Board of Councilmen concurring) the Common Council accede to the proposition of the Board of Trustees of the Brick Presbyterian Church, and will pass the necessary ordinance to remove the restrictions in the grant to said Church, to wit: that the grounds covered by the lease shall not be appropriated to private secular uses, and to carry out, in good faith, the understanding between the Commissioners of the Sinking Fund and the Trustees of the Church, as set forth in the report of the 6th of April, 1853."

The acts of the Corporation were then stated and discussed.

The decision, as before stated, was postponed until an argument upon the question of the validity of the ordinance of the Corporation should be had.

The act of April 12, 1853, entitled "An act further to amend the charter of the city of New York," provided, in its 7th section, that all ferries, docks, piers and slips should be leased, and all leases and sales of public property and franchises (other than the grants of land under water to which the owners of the upland shall have a pre-emptive right) shall be made at public auction, and to the highest bidder who will give adequate security. No lease hereafter given, except as the same may be required by covenants of the Corporation, already existing, shall be for a longer period than ten years; and all ferry leases shall be revocable by the Common Council, for mismanagement or neglect to provide adequate accommodations. Act of 1853.

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All persons, acquiring any ferry lease or franchise under the provisions of this act, shall be required to purchase, at a fair appraised valuation, the boats, buildings and other property of the former lessees, actually necessary for the purposes of such ferry. Previous notice, of all sales referred to in this section, shall be given, under the direction of the Comptroller, for thirty days, in the newspapers employed by the Corporation.

SECTION II.

THE CORPORATION AS TRUSTEES.

In numerous statutes, property acquired by the Corporation is expressly declared to be held by them in trust for particular uses or persons. In several cases, also, particular property is to be held by them in fee, without any designation of the uses or objects.

For example, by the street act of 1813, the property taken through commissioners, for the use of a street, is vested in the Mayor, Aldermen, and Commonalty, in trust for the use of inhabitants and travelers. In various cessions of lands for streets, the habendum is: "To have and to hold all, &c., unto the Mayor, &c., to be and remain forever public streets and ways for the inhabitants of the said city, and all others passing or returning through or by the same, in the same manner as the other public streets of the said city now are, or lawfully ought to be."

The tenure upon which the public squares are generally held, is, "in trust, to be kept open as a public square forever."

Yet in all cases, even where no trust is expressly declared, the tenure must be of a similar character, because the Corporation holds for the use of others besides

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itself. A corporation aggregate is capable of being a trustee; though, by the common law, it was once held that it could not have been seized to a use. But this rule was long ago altered. A corporation, upon which the performance of legal trusts was devolved, could be made as amenable to a court of equity, to compel a due execution, as an individual. Dummer *vs.* Corporation of Chippenham, 14 Vesey, 252; Lewin on Trusts, &c., 31; Law Library, vol. 24, p. 99; Attorney Gen. *vs.* Caius College, 2 Keen, 165; Attorney Gen. *vs.* Drapers' Co., 6 Beavan, 382.

By an act of 5, 6, William IV., cap., 76 (1835), called the Municipal Corporation Act, the great body of municipal corporations were subjected to a uniform system of regulation, and, as to the alienation of lands, a board, termed the Council, was established as the agent of the body; and by section 94, the Council was in effect restrained thenceforward from selling, mortgaging, or alienating their lands, except with the approbation of the Lords of the Treasury.

The provision does not in terms prohibit the sale, without such assent; but declares, that where the Council shall deem it expedient to sell or alienate lands, or to lease them for a longer term than thirty-one years, it should be lawful for the Council to represent the circumstances to the Lords Commissioners of the Treasury; and it should be lawful for such Council, with the approbation of such Lords Commissioners, or any three of them, to sell, alienate, and demise any of the lands, &c., of such corporation, and on such terms and conditions as shall have been approved of by said Lords Commissioners.

This statute and those amending it, as well as our own series of statutes, before stated, impose restrictions upon the power of alienating trust property, which power it is generally said appertains absolutely to corporations seized of lands.*

* 1 Kyd on Corporations, 108; Attorney Gen. *vs.* Wilson, 9 Simons, 30.

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Mr. Grant* questions this proposition, and very learnedly contends that no such rule has been established by any express decision of a Court. Lands are held ordinarily for the purposes of the incorporation; and the alienation diverts them from such purposes.

Who are cestuis que trust.

Who are the beneficiaries, or *cestuis que trust* of the lands held by the Corporation in trust, may not be distinctly settled. The word Commonalty was used in various senses in old documents; but probably it may be taken, in our charters, as synonymous with inhabitants.† Thus, if a royal charter purport to incorporate the inhabitants of D, with power to choose a mayor annually, without giving any name, that is a good incorporation of them by the name of "The Mayor and Commonalty of D." (Anon., Salked, 191; Comyn's Dig., Franchise F.)

The word "inhabitants," in a charter, has not of itself any definite, legal meaning, but must be explained in each case extrinsically, as by evidence of usage, or by reference to the context and objects of the charter. (Rex *vs.* Manhiter, 6 Adol. & Ellis, 153; Rex *vs.* Davis, Ibid., p. 374; Rex. *vs.* Adlard, 4 Barnw. & Cres., 772.)

Perhaps, within the principle declared in these and other leading cases, the nearest practical description of the beneficiaries would be, those entitled to elect the acting representative body, the Mayor, Aldermen and Councilmen.

SECTION III.

SUPERVISION OF CORPORATION AS TRUSTEES.

The rule was declared, in Davis *vs.* The Mayor of New York, &c., (14 N. Y. Rep., 506–526), "that where such an

* On Corporations, p. 129, &c. † Grant on Corporations, p. 13.

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offense (the creating a nuisance in a street) occasions, or is likely to occasion, a special injury to an individual, which cannot well be compensated in damages, equity will entertain jurisdiction of the case, at his suit; and also that the Attorney-General, in all cases where a preventive remedy is called for by the circumstances, or the State, in its own name, may apply for an injunction against the perpetrator of the wrong." Per Denio, Justice.

It was held that an action would not lie in favor of a resident and taxpayer, who did not own real estate on the street, where a railway is proposed to be laid, and to whom it will not be specially injurious, to prevent its construction.

In Doolittle *vs.* The Supervisors of Broome county (18 N. Y. Rep., 155), the general subject was carefully examined, and the proposition was thus stated: "The general rule is, that for wrongs against the public, whether actually committed, or only apprehended, the remedy, whether civil or criminal, is by a prosecution, instituted by the State, in its political character, or by some officer authorized by law to act in its behalf. Where a crime committed against the public also includes a private injury, the latter may, it is true, be prosecuted at the suit of the party injured; but where there is no direct individual injury, no action can be maintained by a citizen, on the ground that his interest, as a member of the State, has been interfered with, or disturbed."

The case of nuisances is then stated, in illustration. "It would be unreasonable to give every man a separate right of action for what damnifies him, only in common with the rest of his fellow-citizens. It is only to be redressed when committed, by a public prosecution, and where it is only threatened, the preventive remedy, by injunction, can only besought in the same manner. Where

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the act complained of, or apprehended, besides being a public nuisance, is especially injurious to a private person, he may maintain an action, or a bill for an injunction, in his own name."

"No private person or number of persons can assume to be the champions of the community, and in its behalf challenge the public officers to meet them in the courts of justice, to defend their official acts."

The authorities in our State are minutely examined, distinguished, or, in substance, overruled.

In the case of Dayton *vs.* The Mayor, &c. (Court of Common Pleas, January, 1861), the principle thus declared was attempted to be avoided, by an allegation, in the complaint, that the plaintiff was an alderman, and as such a trustee, interfering to prevent a wrong threatened by his co-trustees.*

In the case of The People *vs.* the Mayor, Aldermen, &c., (Special Term, Supreme Court, Nov., 1859), Mr. Justice Ingraham observed as follows:

In this case, the Attorney-General, on behalf of the People, moves for an injunction, to restrain the defendants from passing any resolution directing the Croton Aqueduct Department to give the contract for building the gate-houses and aqueduct, for the new reservoir, to Fairchild, Walker & Co., or to any other person, except upon bids made in pursuance of law.

The grounds on which this action, and the motion now made, are founded, is that the Common Council of the city of New York have passed, in one Board, and are about to pass in the other, a resolution directing the contract to be given to Fairchild, Walker & Co., who are alleged to have been the highest, and not the lowest, bidders, when proposals were received for that work; and that such resolution,

* See Addenda.

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if carried out, is a direct violation of the 38th section of the amended charter of 1857, which directs the mode of giving such contracts, and requires them in all cases to be given to the lowest bidder.

The complaint charges such acts to be a usurpation on the part of the municipal authorities, and in direct violation of the provisions of that statute.

One of the questions in this case is, whether this action can be maintained by the Attorney-General, in the name of the People. It has been heretofore held by the General Term of this Court in this district, that a tax-payer cannot maintain any action against the city authorities, to restrain from the commission of illegal or fraudulent acts, without showing special damages to himself.

It has also been held, that the persons who offered to do the work at the lowest price have no right to interfere, before their bid has been accepted, inasmuch as there is no obligation to accept any bid made, and they therefore can sustain legally no damages by such an act, other than any other tax-payers sustain from the same cause.

It must, therefore, be conceded, under these decisions, that unless the Attorney-General can interfere in this way, there is no mode of arresting the consequences of such legislation, and that the only remedy is by criminal proceedings.

So far as the plaintiffs now seek to restrain the passage of the resolution on this subject, I have, some time since, expressed an opinion adverse thereto. In the case of The People and Flagg *vs.* Lowber (7 Abbott Pr. Rep., p. 158), I had occasion to examine fully these questions. It was then held that the legislation of the Common Council ought not to, and could not be restrained by the Courts.

The legislative power of that body is a power resting in their discretion. They have a right to pass such laws

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and adopt such resolutions as in their judgment are proper and necessary, in reference to these matters, which, by the various charters of the city, are subject to their jurisdiction. Until they have legislated upon any subject therein, contemplated action is not known, and it would be equally improper for the Courts to direct what the Legislature shall not do, as it would be to order them to adopt any particular mode of legislation. Any such injunction as is asked for on this branch of the motion would be useless, even if the Court could grant it.

An alteration of the resolution in its phraseology, or the formation of a new one, would render new injunctions necessary, and they too might as easily be evaded. I know that such injunctions have heretofore been granted, but I have never been able to satisfy myself that it was proper to restrain the legislation of any body possessing authority to legislate, and have uniformly refused my assent to such a proposition.

But while I am unwilling to sanction any interference with that legislation of the Common Council, I see no reason why they, and their officers and agents, should not be controlled in the making of contracts in violation of law, or contrary to the provisions of the charter, if a case should be presented to the Court calling for such an interference.

Although the question under discussion is not entirely free from difficulty, I am inclined to the opinion, that in a case showing a clear violation of the charter of the city, about to be performed by the Common Council, this action may be maintained.

As before stated, there is no other way to prevent such acts from being carried out; and when completed, in regard to money or property, there is no redress, except the

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unsatisfactory one to the treasury, of punishing for criminal acts."

He disposed of the application, by denying it, on the ground of the insufficiency of the statement in the complaint, as to the intention to pass the resolution.

This concludes what the author has to submit upon the rights of the Corporation as proprietors of real estate, or of interests therein. The subject is one of great importance: it is of no little complexity, and a source of severe, unceasing litigation. These pages may, perhaps, assist in removing the one, and diminishing the other, by tracing the sources of the title and rights of the Corporation, and attempting to develope the true principles of law upon which they depend.

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ERRATA.

Page 240, line 20, for 1708, read 1798.
Page 274, line 21, for 1688, read 1683.
Page 372, line 5, for 1628, read 1828.

The NOTES and DIAGRAMS will be published in a separate volume, which will be issued in a short time.

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INDEX.

ACT OF THE COLONIAL LEGISLATURE OF 1691 23

Exposition of, by Judges WRIGHT and HARRIS..... 25

ACT OF 1732 :

Its force and legality examined 27-30

Its substantial provisions..... 30

In effect a new grant, comprehending, by specification, every prior grant 30

ACTS, COLONIAL :

Continued in force in constitution of 1777..... 32

Abrogated by statute of 1828..... 32

This inoperative as to charters..... 32

ACTS OF THE LEGISLATURE :

Their operation on the Charters.

See "LEGISLATIVE INTERFERENCE."

ACTS IN RELATION TO WHARVES AND PIERS, LAND UNDER WATER, STREETS, MARKETS, PUBLIC SQUARES AND PARKS.

See those different titles.

ALIENATION—POWER OF, AND RESTRICTIONS ON :

Right attached by charters to lands conferred—by common law as to other property..... 406

RESTRICTIONS :

Sinking Fund restriction..... 406

Act of June 6, 1812..... 406

Ordinance of 29th June, 1812..... 407

Ordinance of August 13, 1813..... 408

Act of 24th March, 1820..... 409

Hosted by Google

ALIENATION—RESTRICTIONS :

Act of 28th March, 1826 409
Revised Ordinances of 1827 409
Act of 19th April, 1828 409
Ordinance of February 11, 1834 410
Ordinance of March 4, 1834 410
Act of May 2, 1834 410
Revised Ordinances of 1839 411
Revised Ordinances of 22d February, 1844 411
Report of Finance Committee, 1843 411
Clauses of the Ordinance of 1844 412
Act of 13th May, 1845 413
Act of 12th March, 1849 414
Act of 20th June, 1851 414
Conclusions from statutes and ordinances 415
Board of Commissioners, their powers and duties 416
Comments on Report of Finance Committee, December 9, 1851 418
Case of Martin *vs.* The Mayor, &c 418
Positions of the Judge 419
Remarks upon 420–423
Case in Louisiana 423
Case of the People *vs.* Wood ; Brick Church property .. 424–437
The ordinance of 1844 considered 437
The reservations, particularly as to quit rents 437
How the assignment of rents affects other conditions of a deed of the Corporation 437
Act of April 12, 1853 437

BATTERY :

See "GOVERNMENT HOUSE AND GROUNDS" 101–112

BROOKLYN :

Contest as to line between New York and Brooklyn 80
Contest as to ferry rights.
See "FERRIES."

Hosted by Google

BURGHER OR MUNICIPAL GOVERNMENT DEMANDED..... 16
Granted in 1652; its character..... 17
Modeled upon the college of Amsterdam..... 17
Its powers to make ordinances contested..... 17

BURGOMASTERS:
Appointed, under conditions of 1656..... 18
Appointed by the common burghers..... 18

BURGHRECT:
Laws respecting, of 1657..... 18

CASTLE GARDEN:
See "GOVERNMENT HOUSE AND GROUNDS"..... 101-113
History of the title to..... 101-113

CESSIONS OF LANDS FOR STREETS:
Habendum in deeds of..... 370
Enumeration of some..... 370

CHARTERS:
Their history..... 17-41
Charter of Freedoms and Exemptions, 1629..... 14
Charter of Nicolls, of 1665..... 19
Charter of Renckes & Evertson, 1673..... 19
Charter of Nicolls recognized in the proclamation of Andross, 1675..... 19
Charter of 1686, petition for, in 1683..... 19
Grant of, in 1686..... 19
Effect of the Duke of York's accession to the throne, upon the charter of 1686..... 20
Was unimpaired..... 22
Effect of revolution of 1688 upon the charter..... 25

Hosted by Google

CHARTERS:

Ratification of, by act of 1691 23
Of Lord Cornbury, 1708 26
Of Montgomery, 1730 26
Effect of the statute of 1732 27–30
Effect of the Revolution upon charters 31
Constitutions of 1777, of 1821, and 1846 31
Repealing act of 1828, inoperative as to charters 32
Of 1830, history of its adoption 36
How far it sprung from the State Legislature 37
Is a contract—saving clause as to former charters, &c... 38
Rejected charter of 1846 38
Amended charter of 1849 39
Saving clause as to former charter, &c 40
Amendment of 1851 40
Statute of 1852 40
Statute of 11th April, 1853 40
Statute of 14th April, 1857 40
Statute of 15th April, 1861 41
Royal charters undoubted source of power 43
Charters, when subject to legislative control.
See "LEGISLATIVE INTERFERENCE."
Acceptance of alterations. *See* ibid.
Mode of proving 77

COMMON LANDS:

Dutch grant for all unconceded lands within the walls, made 1658 126
Grant in Dongan's charter, 1686 127
Grant in Montgomery's charter, 1730 127
Exceptions in latter.
See "TITLE OF CORPORATION TO LANDS."
Compiled map of part of, 1773 128
Map of common lands, 1796 128

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COMMON LANDS:

Report of Finance Committee upon the common lands, 1834 129

Principles and propositions for adjusting boundaries of owners, &c 129, 130

Act of May, 1836, relating to 130

Common lands of Harlem.

See "HARLEM."

COMMON SCHOOL ACTS:

Land acquired under 132

CONDITIONS OF 1656 18

CONSTITUTION OF 1777:

Provision as to charters 31

CONSTITUTION OF 1821:

Provision as to charters 31

CONSTITUTION OF 1846:

Provision as to charters 31

CORPORATION OF NEW YORK:

Position of its legal rights and character, 1776 27

Effect and importance of the act of 1732 27

The objections to its legality and force discussed 27–30

Rights and powers of Corporation could be placed upon this act alone, if necessary 34–36

General powers of, and how far controllable.

See "LEGISLATIVE INTERFERENCE." 41, 77

Capacity to hold lands.

See "LANDS AND HEREDITAMENTS."

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CORPORATION AS TRUSTEES, THE:

Various parcels held by a trust expressed in a statute... 438
In others, none declared yet exists..... 438
Corporation competent to become a trustee..... 438
Municipal Corporation act of William IV., and cases under it..... 439
Who are the *cestuis que trust*..... 440
Meaning of word inhabitants..... 440
Meaning of word commonalty..... 440
Supervision of Corporation as trustees..... 440
Rule in Davis *vs.* The Mayor..... 440
Doolittle *vs.* Supervisors, &c..... 441
Case of Dayton *vs.* The Mayor, &c..... 442
Case of the People *vs.* The Mayor, &c..... 442

COURT-HOUSE:

Land taken under statute respecting..... 135

CRIPPLE BUSH:

Title in the Corporation, 1686..... 120
Granted in 1733..... 120

DIRECTOR-GENERAL AND COUNCIL, 1665..... 15

DONGAN'S CHARTER:

Grant of April, 1686..... 19
Reservations of parcels of land in.....100–110
See "RESERVATIONS."

DUKE OF YORK:

Effect of his accession to the throne upon the charters of governors..... 20

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EMINENT DOMAIN:

See "LEGISLATIVE INTERFERENCE."

EXTERIOR LINE OF STREETS.....370–382

Fixed by ordinances of 1795, 1796, and act of 1798.... 371

Under acts of 1807 and 1826..... 372

EAST RIVER LINE:

On map of Commissioners 1807..... 372

Under act of 1824..... 373

Act of 1826, Tompkins street..... 373

Act of 11th May, 1835..... 374

Plan of 1840, ordinance of 1850..... 375

Statement of case Nott *vs.* Thayer..... 376

Act of March, 1855..... 377

Act of April, 1857..... 378

EXTERIOR STREET ON HARLEM RIVER..... 380

Act of April, 1852..... 380

Extent of street into the stream undefined..... 381

But not to impair navigation..... 381

Act of 27th April, 1860..... 381

EXTRAVAGANT GRANTS OF 1694, &c.:

History of, and their annulment..... 121–124

FERRIES..... 273

First record, order of 1654..... 273

Petition of 1658..... 274

Court order of 1660, as to excess of ferriage..... 274

Petition of 1683, order thereon..... 274, 275

Clause in charter of 1688..... 275

Acts of the Common Council as to..... 275

Hosted by Google

FERRIES :

Petition of 1702, to Lord Cornbury..... 276
Petition of C. Sebring, 1708..... 277
Reply of Corporation..... 277
Petition for grant on Nassau Island..... 278
Action of Council on petition..... 278
Lord Cornbury's charter..... 278
Thirty-seventh section of Montgomery's charter..... 281
Clause in fifteenth section of Montgomery's charter.... 281
Statutes of 1717, 1724, and 1732..... 281
Latter the law till 1789..... 281
Application of Brooklyn, 1746..... 282
Act of 1789..... 282
Acts of 1801, 1813, 1815, 1822..... 283
Act of 1814..... 284
Report of Ferry Committee, 1831..... 284
Powers of Corporation under charter..... 285
Act of 1845..... 286
Case of Benson *vs.* The Mayor, &c..... 286
Question left undecided in that case, as to ferries not existing at date of act..... 289
Power as to other ferries equally absolute and uncontrolled..... 289–299
Recognized by Justice Roosevelt..... 299
Case of The People *vs.* The Mayor..... 300
As to the power to establish rates of ferriage..... 301

FORT JAMES AND FORT GEORGE:

Reserved in Dongan's and Montgomery's Charters..... 100
Disposition of, act of 1790..... 101

FOUR HUNDRED FEET BEYOND LOW WATER:

Petition for, 1730..... 186
Grant in Montgomery's Charter..... 186

Hosted by Google

FOUR HUNDRED FEET BEYOND LOW WATER:

Resolution of Corporation of 1793 187
Resolution of May of 1793 187
Ordinances of 1795 and 1796 187
Magnin's map of shore 188
Of Loss, 1807 188
Laws of 1798, 1801, 1813 188
Laws of 1820, 1830, 1807, 1826 ..... 189, 190
Laws of 1828, 1837, 1846 191
Ordinance of 1844 191
Law of May, 1845, Croton Water Stock 192
Act of April 17, 1860, for survey 193
Maps and surveys under this act 194
Comparative results under ordinances of 1795-96, and Charter 194
Legal conclusions, as to the four hundred feet, from Charter and statutes 196
Extent of grant 197
System and acts of the Corporation, in relation to 197
The right absolute and in fee 199
Whitney *vs.* The Mayor, &c 199
Mayor, &c., *vs.* Scott 204
Opinion of Judge Talmadge, 1839 204
Furman *vs.* The Mayor, &c 204
Points decided in 206
Grants of Corporation before 1798 209
Classes, and as connected with streets 209
Classes on East River 209
Classes on North River 210
Remarks upon the authorities 211
Owner of ground not compellable to fill up other ground, though given him in compensation 212
Comment on phrases of statute of 1798, *at and on extremity* of grants 215
Report of E. Taylor and Judge Ingraham, 1838 218

Hosted by Google

FOUR HUNDRED FEET BEYOND LOW WATER:

Analysis of memorial of Corporation for, and statute of 1798..... 218
Questions as to the right to the four hundred feet, or part of it, when ownership of tide-way in others... 221
Character of the legal right of the Corporation to this parcel..... 222–225
Right of the Crown—right of the State—of Parliament —force of the act of 1732..... 226
Jurisdiction of Congress..... 225
Case of State of Pennsylvania *vs.* Wheeling county..... 227
Other authorities..... 230

FRESH WATER POND:

History of the title—one of the extravagant grants..... 121
Grant of, with swamp, to A. Rutgers..... 124
Claim of Corporation asserted..... 125
Purchase of, and release by heirs of A. Rutgers..... 125
Right of Corporation to, reserved in Colonial acts..... 125

GOVERNMENT OF THE PROVINCE:

From 1615 to 1650..... 13

GOVERNMENT HOUSE AND GROUNDS..... 101

History of title to, and disposition of..... 101

GOVERNOR'S GARDEN..... 116

GRANTS OF ENGLISH GOVERNORS BEFORE 1686..... 117

Grants of the Corporation of land under water before 1798..... 209

See "FOUR HUNDRED FEET BEYOND LOW WATER."

GROUND BRIEFS, DUTCH—NATURE OF..... 94, 95

Hosted by Google

HARLEM:

Patent of 1606, for common lands..... 131
Boundaries of the line..... 131
Act of Assembly, of 1772, fixing lines of division with New York..... 132
Statutes of March 28, 1820, as to mode of paying assessments for avenues..... 132
Inhabitants under jurisdiction of New York..... 132
1683, Out Ward included Harlem..... 132

HIGH AND LOW WATER MARK—STRIP BETWEEN:

See "LAND UNDER WATER BETWEEN HIGH AND LOW WATER."

INDIAN GRANT OF MANHATTAN ISLAND..... 93

KING'S FARM..... 116
Grant of, in 1705, held valid by Court of Appeals..... 123

LANDS AND HEREDITAMENTS:

Capacity of the Corporation to take and hold..... 87
Conferred by Dongan's Charter..... 87
And by Montgomery's Charter..... 88
Restrictions as to amount, in Charter..... 89
Cases, and opinions, and remarks upon..... 89–91
Restriction under street laws..... 91
See "TITLE TO LAND."..... 93

LANDS HELD BY CORPORATION AT DATE OF DONGAN'S CHARTER, APRIL, 1686..... 99
Origin of title of lands south of line of map of 1807.... 99
Principal portion under Dutch grants..... 99
Reservations of parcels in Dongan's Charter..... 100
Fort James (George), Government ground..... 101
Messuage next the City Hall..... 115

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LANDS HELD BY CORPORATION, &c. :

Reservations of parcels in Dongan's Charter :

Messuage near the Fort 115
Governor's Garden 116
King's Farm 116
The swamp by the fresh water 117

Grants of English Governors before 1686 117
The Vineyard 118
The Lutheran church 118

What lands were vested in the Corporation before, and by the Charter of 1686 119
The new burial-place without the gate 119
The Cripple Bush 120
The Fresh Water Pond 121

Doubts whether it did not belong to the Corporation... 121
History of the extravagant grants comprising it 121–124

See further, "FRESH WATER POND."

Land acquired under particular statutes 132–136
Under common school acts 132
Lands sold for taxes and assessments 134
Under police acts 135
Court House 135

TITLE OF CORPORATION TO PARTICULAR PARCELS 136–159

PARKS AND SQUARES :

Duane Street Park 136
Madison Square 136
Madison Park 137
Stuyvesant Square 137
Stuyvesant Park 138
Tompkins Square 141
Union Place 141
Abingdon Park 142

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TITLE OF CORPORATION, &c.—PARKS AND SQUARES:

Mission Park 142
Park on Grove street 142
Manhattan Square 143
Mount Morris Square 143
Washington Square 143
Reservoir Square and Distributing Reservoir 143
Central Park and Receiving Reservoirs 144
Blackwell's Island 145
Randall's Island and Sunken Meadow 147
Ward's Island 148
The Alms-house 148
The Bowling Green 150
The Croton Aqueduct 150
The Powder Magazine 156
Land originally taken for Canal street 157

LAND UNDER WATER, LONG ISLAND SHORE:

See "LONG ISLAND SHORE."

LAND UNDER WATER BETWEEN HIGH AND LOW WATER....180–186

Grant in 3d section Dongan's charter 180
And in 14th section Dongan's charter 180
In 37th section of Montgomery's Charter 181
Waste, vacant and unpatented land granted to low water mark 182
If owner of upland, is owner to low water 182
Source of title from high water to low water is the Corporation grants 182
Title to such strip vested in Corporation, even in case of a previous grant to an individual, of upland 183
Nott *vs.* Thayer—tideway 185
Line of low water mark defined under act of April, 1860 186

Hosted by Google

LAND UNDER WATER FOUR HUNDRED FEET BEYOND LOW WATER.

See "FOUR HUNDRED BEYOND LOW WATER."

LAW REGULATING THE COLONY UNDER THE DUTCH RULE, 14-98

LEGISLATIVE INTERFERENCE AND CONTROL 41-77

First question, whether the particular power is conferred 41
Next, its nature decides whether it may be revoked or not 41
If it may, the statute becomes source of power 42
And this exclusively or concurrently 42
Acts of Legislature regulating the exercise of charter powers—their effect 42
Acts giving powers or rights not before possessed 43
Royal charters sources of rights to property 43
Grants of property, and franchises coupled with an interest, beyond control 44
Excepting same control as in regard to private property—eminent domain 44
What interests decided to be exempt 45
Mere political powers subject to control 45
Statute of 6 William IV. analogous 45
Bailey *vs.* Mayor of New York, and other cases, upon the powers and franchises 46, 48
Authorities in the Courts of New York upon the question of legislative interference 48, 55
Sutton *vs.* Sutton 48
Mayor *vs.* Orderan 50
Same *vs.* Nicolls 51
People *vs.* Morris 52
Harrington *vs.* Trustees Rochester 52
Furman *vs.* Knapp 53
Coutes *vs.* The Mayor, &c. 54
The People *ex rel.* Lynch *vs.* The Mayor, &c. 55
The People *ex rel.* Lynch *vs.* Purdy 55

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LEGISLATIVE INTERFERENCE AND CONTROL:

Authorities in the Courts of New York, &c.:

The People *ex rel.* Lynch *vs.* Morris 55

Ex parte Lynch..... 55

Regents, &c., *vs.* Williams, Maryland..... 55

EXAMPLES OF STATUTES CONTROLLING EXERCISE OF CORPORATION POWERS 57

1. Selection of a Mayor..... 57
2. Division of wards..... 57
3. Courts of justice..... 58
4. Qualification of electors..... 85
5. Time of election 59
6. Licenses for farmers..... 60

Alterations of charters by consent..... 61

When inferable from application, or acquiescence..... 61

What amounts to an acceptance..... 62

Who competent to assent..... 63

Discussions in Matsell's case, 1851 63

Legislative power essential to alterations..... 65

Presumption against the surrender of a franchise..... 65

The doctrine of compact in a charter 65

Assent of the Common Council to alterations is enough, upon principle of representation 66

Proposition of 1851, that no amendment should be made without submission to citizens 68

LEGISLATIVE AID:

When necessary..... 69

For better exercise of powers given by charter..... 69-76

For exercise of other powers or rights..... 69-76

Croton Aqueduct an example of latter—property and regulation arise from the statutes 70

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LEGISLATIVE AID—LEGISLATIVE AID ESSENTIAL:

1. To levy taxes..... 70
2. To take property for municipal use..... 70
3. To charge private property specially for a work of public benefit, done by corporation..... 71
4. Assessing individuals for peculiar benefit..... 71
5. Other remedies for enforcing charter rights than are conferred by the charters..... 71

Results as to question of power, mode of exercise, or validity of ordinances..... 72

EMINENT DOMAIN..... 73

Corporation in same position as an individual..... 73
Its position as trustee no ground of distinction..... 73

CASES ON EMINENT DOMAIN:

Heyward *vs.* The Mayor, &c..... 73
The People *vs.* Smith..... 75

LONG ISLAND SHORE—LAND UNDER WATER UPON:

Charter of 1708, ground of Corporation's claim..... 159
Analysis of such charter, and petition therefor..... 160
Grant of soil in Montgomery's Charter..... 162
Statement of contest between New York and Brooklyn upon this subject.....163–180
Statutes fixing exterior line.....165–168
Grounds on which the claim of New York is contested.168–175
Grant of a sovereign, on a navigable river, extends only to high-water mark..... 169
Absolute ownership of strip between high and low water may be granted..... 170
Action of Remsen *vs.* New York, 1775..... 173
Limits of the grant..... 176
Grant of Governor Fletcher, 1697..... 178

Hosted by Google

MANHATTAN ISLAND :

Formed incorporated limits of city in 1665..... 76

MARKETS :

Ordinance of January, 1676..... 390
Ordinance of March, 1683..... 390
Recited in Dongan's Charter..... 390
Market at Countess Key, 1699..... 390
At end of Wall street, 1731..... 391
Law of 1731, regulating the markets—enumeration of markets in same..... 391
Charter of Montgomery—list of markets..... 391
Power conferred to erect others..... 391
Course adopted, 1735..... 391
Statute regulating in part, 1813..... 392
Ordinances of regulation..... 392
Act of March 22, 1822, authorizing markets over waters of rivers..... 392
Washington Market..... 392
West Washington Market case..... 393
Fulton Market..... 395
Catharine Market..... 398
Franklin Market..... 398
Gouverneur Market..... 398
Essex Market..... 399
Clinton Market..... 399
Centre Market..... 400
Union Market..... 400
Jefferson Market..... 401
Tompkins Market..... 401
Market, Avenue C and East River..... 402
Power to erect new markets vested in Corporation..... 403
Power to build or repair subservient to public rights to use of streets..... 403
No right to stalls encroaching on streets..... 403

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MONTGOMERY'S CHARTER:

See "CHARTERS."

NEW AMSTERDAM:

Name of New York in 1647 78

NEW BURIAL-PLACE WITHOUT THE GATE 119

Title to, in Corporation, 1686 119

NEW JERSEY:

Adjustment of line with New York 83, 84

OBJECTIONS TO THE CHARTERS OF 1686 AND 1730:

Examined and refuted 26

ORDINANCES UNDER CHARTER, 1686 25

Mode of framing ordinances 77

PATENTS:

Patent to Duke of York, 1664, 1674 20

Royal patents, and those of governors, sources of title.

See "TITLE OF CORPORATION TO LANDS."

PIERS:

See "WHARVES, PIERS AND SLIPS."

POLICE ACTS:

Land acquired under 135

PROOF OF CHARTER:

Volume printed by authority of Common Council may be read in evidence 77

PROOF OF ORDINANCES 77

PROVISIONAL ORDER OF 1656 16

Hosted by Google

RAILROADS IN THE CITY..... 347–369

STATUTES RESPECTING..... 348

Harlem Railroad, April 25, 1831..... 348
Hudson River Railroad..... 348
Act of 2d April, 1850..... 348
Act of 4th April, 1854..... 348
Act of 14th April, 1860..... 350
Act of 17th April, 1860..... 350
Other statutes..... 352

DECISIONS RESPECTING :

Drake *vs.* Hudson River Railroad Company..... 352
Hope *vs.* Sixth Avenue Railroad Company..... 353
Wetmore *vs.* Story..... 360
Davis *vs.* Mayor, &c..... 363
People *vs.* Trustees Sailor's Snug Harbor..... 364
The New York and Harlem Railroad Company *vs.* The Mayor, &c..... 366

CONCLUSIONS OF AUTHOR :

1. If a railroad in a city is established by competent authority, it cannot be a nuisance..... 367
2. The fee in all the public streets is vested in the Corporation..... 368
3. If there were no legislative prohibition, the Corporation can license a railroad, subject to the power of revocation..... 368
4. It is out of the power of the Legislature to establish a railroad, without the assent of the Corporation.. 368–9
5. Legislative authority to regulate the exercise of the Corporation right, delicate and undefined..... 369
6. If concurrent assent of Legislature to construction of a railroad be at all necessary, then only to remove obstructing legislative acts..... 370

REPRESENTATION OF THE PEOPLE FIRST IN 1647..... 15

Hosted by Google

RESERVATIONS IN DONGAN'S CHARTER..... 100
Government House Grounds, Battery (Castle Garden).. 101
Messuage next the City Hall..... 115
Messuage by the Fort..... 115
Governor's Garden..... 116

RESTRICTIONS ON ALIENATION:
See "ALIENATION."

REVOLUTION:
Effect of, upon the charters..... 31

RIPARIAN OWNERS:
No right to dock out between high and low water, unless authorized by State..... 175

ROADS AS DISTINGUISHED FROM STREETS:
Instructions to owners of highways, 1673.....382, 390
Order of 1671, highway between Fresh Water and Harlem..... 383
Statute of May, 1691, overseers of highways..... 383
Did not extend to city of New York..... 383
Act of October, 1691, relative to streets..... 383
Act of June, 1703..... 383
Commissioners under..... 384
Its renewals..... 384
Survey of highways..... 384
Road in Queen street to Fresh Water..... 384
Successive acts of 1713, &c., of 1751..... 385
Act of 1764, act of 1787..... 386
Latter in force till 1807..... 386
Statement of general highway acts.....387–389

ROYAL CHARTERS:
See "CHARTERS."

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SCHEPENS :

Appointed under conditions of 1656..... 18
Number and how chosen 18

SCHOUT :

Appointed under conditions of 1656..... 18

SLIPS :

See "WHARVES, PIERS AND SLIPS."

SOURCES OF THE TITLE TO LANDS :

See "TITLE TO LANDS."

STREETS :

Importance of subject.....302, 370
1. Upon question of reverter..... 302
2. Power of prescribing mode of using..... 302
3. Power of Legislature to control..... 302
Importance of question in whom the right of soil exists. 303
Historical notice..... 303
Title of streets opened prior to 1664..... 303
Title opened subsequently through lands granted and held under Dutch title 303
In each case, right of State to take land for streets in absolute ownership, clear.....303–305
Right devolved to Crown—has become vested in Coporation, *sub modo*, as to exercise.....306, 312
Proceedings of Dutch in relation to streets 306, 311
Effect of the surrender of 1664 311
Charter of 1686, as to streets..... 313
Phrase in it, *some known law of the Province*, considered ... 314
Act of October 9, 1691—its great importance ; its provisions.....315, 317
In force till April 16, 1787..... 317

Hosted by Google

STREETS :

Construction of act of 1691 317

Other statutes—act of 1793, giving the whole right of the people in land left for streets to Corporation.... 318

Act of April 9, 1807..... 319

Act of April 2, 1808, as to new streets, approval of Corporation necessary..... 321

Question of title and use of streets examined under following heads :

1. Streets opened under act of 1807, and the subsequent statutes based upon it..... 321
2. Streets opened under acts of 1691 and 1787.... 321
3. Streets opened prior to surrender of 1664..... 321
4. Streets opened by private owners, and adopted as public streets..... 321
5. Private ways..... 321

Examination of the authorities, termed street cases.... 323

Amity lane, opinions of counsel..... 326

Fee of soil in streets opened under law and map of 1807, and law of 1813, as amended, clearly vests in Corporation..... 328

Character of the title—one in trust..... 328

Operation of acts of 1691 and of 1784 upon question of title, on streets laid out under them..... 328

Quite clear that the absolute fee passed, where the streets ran over land derived from Dutch groundbriefs..... 328–333

Operation of acts of 1691 and 1784, upon streets opened through lands held under English patents..... 333–347

The importance of the act of March 7th, 1793..... 331, 343

John street case, and act of 1818..... 344

Statement of authorities..... 346, 347

Title and rights of Corporation discussed in the Railroad cases.

See "RAILROADS IN THE CITY."

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STREETS:

Cessions of land for.

See "CESSIONS."

Exterior line of.

See that title.

STUYVERSANT, PETER:

Appointed Director-General..... 15
His powers, contest with.. ..... 15, 16

SUPERVISION OF CORPORATION AS TRUSTEES:

See "CORPORATION AS TRUSTEES." 440, 444

SWAMP BY THE FRESH WATER..... 117
Granted to Anthony Rutgers, 1733..... 125, 126

TAXES AND ASSESSMENTS:

Land acquired under statutes respecting..... 134

TERRITORIAL EXTENT AND JURISDICTION..... 78-84

Charter of 1605 comprised Manhattan island..... 78
City called New Amsterdam before 1647..... 78
Division into wards, 1683..... 78
Under Dongan's charter, comprised the island coves, waters, &c..... 78
County of New York erected, 1683..... 78
Act dividing the province into counties, 1691..... 79
County of New York, what it comprised..... 79
Boundaries of city defined by Montgomery's charter... 79
Its wards bounded and declared..... 79
Boundaries of county, in act of 1788..... 79
And in Revised Statutes of 1830..... 79
Jurisdiction subordinate to State..... 80

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